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No. 10506

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol
2367

GEORGE A. KOCH, Executor of the Estate of
ADOLPH J. KOCH, Deceased,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

SEP 18 1943

No. 10506

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE A. KOCH, Executor of the Estate of
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

GERALD S. CHARGIN, ESQ.

For Comm'r:

ARTHUR L. MURRAY, ESQ.

Docket No. 109007

GEORGE A. KOCH, AS EXECUTOR OF THE
ESTATE OF ADOLPH J. KOCH,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Amended Title

Estate of Adolph J. Koch, George Koch, Executor,
See order of 7-16-41.

DOCKET ENTRIES

1941

June 28—Petition received and filed. Taxpayer
notified. Fee not paid.

June 28—Copy of petition served on General Coun-
sel.

July 14—Fee paid—check.

July 16—Copy of petition served on General Coun-
sel.

July 11—Motion to amend caption filed by tax-
payer.

1941

July 16—Order that caption be amended to read estate of Adolph J. Koch, George Koch, executor entered.

Aug. 16—Amended petition filed. 8-19-41 copy served.

Sept. 3—Answer filed by General Counsel (to amended petition).

Sept. 3—Request for hearing in San Francisco, Calif. filed by General Counsel.

Sept. 5—Notice issued placing proceeding on San Francisco, Calif. calendar. Service of answer and request made.

1942

Oct. 12—Hearing set November 16, 1942 in San Francisco, California.

Nov. 21—Hearing had before Judge Mellott, on merits. Submitted. Withdrawal of Victor E. Cappa, Esq. filed. Appearance of Gerald S. Chargin, Esq. filed. Petitioners brief due 1-5-43, respondents 2-4-43, reply 2-19-43.

Nov. 21—Withdrawal of Victor E. Cappa filed at hearing. Granted.

Dec. 11—Notice of appearance of Gerald S. Chargin as counsel for taxpayer filed.

Dec. 10—Transcript of hearing 11-21-42 filed.

1943

Jan. 4—Motion for extension of time to Jan. 30, 1943, to file brief filed by taxpayer. 1-4-43 granted.

Jan. 12—Brief filed by taxpayer. 1-12-43 copy served on General Counsel.

1943

Feb. 6—Reply brief filed by General Counsel.
Served 2-8-43.

Feb. 15—Reply brief filed by taxpayer. 2-15-43
copy served on General Counsel.

Apr. 13—Memorandum findings of fact and opinion rendered, Mellott, Judge, Div. 11. Decision will be entered for the respondent. 4-14-43 copy served.

Apr. 14—Decision entered, Mellott, Judge, Div. 11.

June 29—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

June 29—Proof of service filed of petition for review, praecipe, and statement of points.

June 29—Praecipe filed by taxpayer.

June 29—Statement of points filed by taxpayer.

[1*]

United States Board of Tax Appeals

Docket No. 108007

GEORGE A. KOCH as Executor of the Estate of
Adolph J. Koch,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

*Page numbering appearing at top of page of original certified Transcript of Record.

Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols, IRA:90-D:CSW (C:TS:PDSF:MWB) dated May 22, 1941 and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual, with residence at 144 Funston Avenue, San Francisco, California, and is the executor of the estate of the late Adolph J. Koch on behalf of which this petition is filed. The return for the period here involved was filed with the collector for the First District of California.

2. The notice of deficiency (a copy of which is hereto annexed and marked Exhibit A) was mailed to the petitioner on May 22, 1941.

3. The taxes in controversy are estate taxes. Date of death is June 29, 1939. The deficiency asserted is \$22,544.18, the entire amount of which is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the gross estate of the decedent Adolph J. Koch, the Commissioner erroneously included therein the value of certain properties transferred by the decedent and certain cash gifts made by him in his lifetime to his son, George Koch, his grandson, Ralph J. Swickard, and to certain relatives, V. Koch and Daisy Koch, all of which appear fully in items (a) to (f) of the statement attached to Exhibit A annexed hereto.

(1) That the Commissioner erroneously

determined that the foregoing transfers and gifts were made by the decedent in contemplation of death.

(2) That the Commissioner erroneously determined that the decedent with respect to the properties transferred by him in trust for his grandson Ralph Swickard as described under item (a) [2] of the statement attached to Exhibit A, reserved the power to alter, amend, revoke, or terminate said trust within the provisions of Section 811 (d) of the Internal Revenue Code.

(b) In determining the net estate of the decedent, Adolph J. Koch, the Commissioner erroneously disallowed as a deduction an additional sum of \$500 payable to Mrs. Angelyn Compton, housekeeper and nurse to decedent.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The decedent Adolph J. Koch did not sustain a partial stroke in June 1938, nor was his physical condition impaired thereafter as found by the Commissioner but in fact he was in excellent health for a man of his age at the time the gifts and transfers were made and almost until the date of his death in June 1939. At the time of those gifts, and until a few months before his death, he was unusually active, was looking forward to travel, and was strenuously participating in fraternal and business affairs.

(b) At no time during 1938 and 1939 when the gifts were made did he entertain any thought of death and the gifts were motivated entirely by other controlling considerations and purposes associated with life, rather than with death.

(c) The discussions with his tax advisor cited by the Commissioner were held about ten years before his death and were in no way the motivating cause, dominant purpose, or inducing motive of the gifts.

(d) That the additional sum of \$500 payable to Mrs. Angelyn Compton was an enforceable legal liability against the estate at the date of death.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that no deficiency is due from the petitioner.

(Signed) VICTOR E. CAPPA

(Counsel)

Bank of America Building
San Jose, California [3]

State of California

County of Santa Clara—ss.

George Koch, being duly sworn, says that he, as executor of the estate of Adolph J. Koch, is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein; and that the statements contained therein are true, except those stated to be

upon information and belief, and that those he believes to be true.

(Signed) GEORGE KOCH

Subscribed and sworn to before me this 20th day of June 1941.

(Signed) G. E. BRIERLY [4]

74 New Montgomery Street
San Francisco, California

San Francisco

IRA:90-D:CSW

(C:TS:PD

SF:MWB)

Estate of Adolph J. Koch, Deceased,
Mr. George A. Koch, Executor,
144 Funston Avenue,
San Francisco, California

MT:ET-9914-1st California

Estate of Adolph J. Koch

Date of Death: June 29, 1939

Sir:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of \$22,544.18, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may

file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner,

By

Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form or waiver. [5]

Estate Tax

San Francisco

IRA:90-D:CSW (C:TS:PD

(SF:MWB

MT-ET-9814-1st California

Estate of Adolph J. Koch

Date of death: June 19, 1939

STATEMENT

In making this determination of your Federal

estate tax liability, careful consideration has been given to your protests dated November 20, 1940, and February 20, 1941, and to statements made at the conferences held on December 18, 1940, and March 20, 1941.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form of waiver, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of this form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for redetermination of the deficiency.

The deficiency results from the following adjustments:

	Returned	Tentatively Determined	Determined
Gross Estate			
Stocks and Bonds:			
Added item 2, Masonic Hall			
Assn., 2 shares	\$ 0.00	\$ 30.00	\$ 30.00

Transfers during decedent's life:

The value of the following described properties, transferred by the decedent in his lifetime, is included in the gross estate, it being determined that said transfers were made in contemplation of death, and come within the provisions of section 811(c) of the Internal Revenue Code, and it is further determined that the value of the properties transferred by decedent in trust, as

Gross Estate	Returned	Tentatively Determined	Determined
described under item (a) herein below, is includible in the gross estate under the provisions of section 811(d) of the Internal Revenue Code as decedent reserved the power to alter, amend, revoke, or terminate said trust: [6]			

Item (a) Properties transferred into trust by decedent on Dec. 20, 1938 for the benefit of his grandson, Ralph J. Swickard. Said properties are described in your return of Schedule G of Transfers as items numbered below, and the values are finally determined as indicated herein below:	0.00	\$79,001.53	\$79,001.53
---	------	-------------	-------------

	Determined
Item 1	\$ 5,331.25
Item 1 Accrued interest	\$42.78
Item 2	10,887.50
Item 2 Accrued interest	27.22
Item 3	10,937.50
Item 3 Accrued interest	25.28
Item 4	10,000.00
Item 5	5,000.00
Item 6	15,650.00
Item 6 Accrued dividends	225.00
Items 7, 8 and 9	3,900.00
Items 10 and 11	6,100.00
Items 12, 13 and 14	10,875.00

Total value of trust of

Property	79,001.53
----------	-----------

Item (b) Properties transferred by decedent on December 20, 1938, to his son, George A. Koch, which properties are described in the return under Schedule G of Transfers as	0.00	\$79,290.98	\$79,290.98
---	------	-------------	-------------

items numbered below, the values of which are finally determined as follows:

	Returned	Tentatively Determined	Determined
			Determined
Item 15		\$ 5,431.25	
Item 15 Accrued interest		42.78	
Item 16		11,075.00	
Item 16 Accrued interest		29.17	
Item 17		10,937.50	
Item 17 Accrued interest		25.28	
Item 18		10,000.00	
Item 19		5,000.00	
Item 20		15,650.00	
Item 20 Accrued interest		225.00	
Items 21, 22 and 23		3,900.00	
Items 24 and 25		6,100.00	
Items 26, 27, and 28		10,875.00	

Total \$79,290.98

[7]

Item (c) Transfers made by decedent to his son, George A. Koch, during the year 1939 described in the return under Schedule G of Transfers as items numbered below the values of which are finally determined as follows:

Item 29

Cash transferred on

January 3, 1939 \$ 4,000.00

Item 30

Cash transferred on

January 4, 1939 10,000.00

Item 31

10 sh. of San Jose

First National Bank

transferred on Jan.

15, 1939 2,650.00

Item 32

Real estate transferred

in May 1939 6,000.00

	Returned	Tentatively Determined	Determined
Added Item 32½— (Not described in the return) \$500 build- ing and loan com- pany certificate transferred on Jan. 4, 1939			500.00
Total			\$23,150.00

Item (c) 32, above, and Item (d) 36 below, represent the value of two tracts of real property described in the return at sub-items 2 and 3 of Schedule G of Transfers. Sub-item 1 of said Schedule, describing real estate located on Third Street, 148.38 feet north of San Carlos Street, in San Jose, California, and valued at \$6,000.00 is held not to have been transferred in contemplation of death by decedent, and, therefore, not includible in the gross estate. The value thereof, which heretofore was tentatively included in the gross estate, has been eliminated from said items herein. [8]

	Returned	Tentatively Determined	Determined
Item (d) Transfers made by de- cedent to his grandson, Ralph J. Swickard, and described in the return under Schedule C of Transfers as items numbered below, the value of which are finally determined as follows:	0.00	\$24,000.00	\$21,000.00
Item 33 Cash transferred on January 3, 1939			\$ 4,000.00
Item 34 Cash transferred on January 4, 1939			10,000.00

	Returned	Tentatively Determined	Determined
Item 35			
1930 Dodge Coupe transferred on Jan. uary 15, 1939	500.00		
Item 36			
Real estate transferred In May 1939	6,000.00		
Added Item 36½ (Not described in the return) \$500 build- ing and loan com- pany certificate transferred on Jan. 3, 1939	500.00		
Total	\$21,000.00		
Item (e) Transfer of cash made by decedent on December 24, 1938 to Mrs. V. Koch	0.00	1,000.00	1,000.00
Item (f) Transfer of cash made by decedent on January 18, 1939, to Daisy Koch	0.00	1,000.00	1,000.00

During the period from December 20, 1938 to the date of death, June 29, 1939, the decedent made substantial gifts (as above set forth) of property to certain specific beneficiaries under his will, and to his son and grandson, both designated residuary legatees in the will, in the aggregate sum of \$204,442.51, the value of which was not included in the gross estate in the Federal estate tax return. Because the decedent, while in advanced age, suffered a partial stroke in June, 1938; his physical condition thereafter being impaired; his discussion with his tax advisor of advantages in disposing of properties by gifts over disposition by bequest; and that gifts were made to persons nominated as objects of his bounty under the provisions of his will, it is

held that transfers of properties during the seven months preceding the date of death, were made in contemplation of death, and the gross estate is accordingly increased by the sum of \$204,442.51. [9]

	Returned	Tentatively Determined	Determined
Deductions			
Debts of decedent:			
Item 2 Amount paid to Mrs.			
Compton, nurse-housekeeper	\$500.00	0.00	0.00

In the Federal estate tax return there were claimed as debts of the decedent, accrued compensation of \$75.00 for June, 1939, due Mrs. Angelyn Compton, housekeeper and nurse to decedent, and an additional sum of \$500.00 was claimed as payable to Mrs. Angelyn Compton. Inasmuch as the sum of \$500.00 claimed as a deduction in favor of Mrs. Angelyn Compton, nurse, was not an enforceable legal liability at the date of death, deductions for debts of the decedent are accordingly decreased by the sum of \$500.00.

Added Item 16 U. S. Gift Tax			
liability of decedent for calendar year 1939	00.00	0.00	5,374.12

In the Federal estate tax return there was claimed as a deduction for deficiency in Federal gift taxes for 1938 in the amount of \$27.00, but no deduction was claimed for gift taxes on transfers during 1939. Subsequent to the date of death the executor of the estate filed a gift tax return for the year 1939 disclosing a gift tax liability of \$5,100.00, and subsequently a deficiency in 1939 gift taxes was determined and assessed in the amount of \$274.12,

a total of \$5,374.12. The entire liability for gift tax on 1939 gifts constitutes a definite obligation at the date of death, and debts of the decedent are accordingly increased by the sum of \$5,374.12.

In view of the foregoing, the Federal estate tax liability of this estate is finally determined as follows:

	Determined
Gross estate	\$347,077.90
Deductions for basic tax	110,918.57
Net estate for basic tax	\$236,159.33
Net estate for additional tax	\$296,159.33
Gross basic tax	\$ 5,946.37
Credit for gift tax	3,064.55
Gross basic tax less gift tax credit.....	\$ 2,881.82
Credit for State estate, inheritance, legacy or succession taxes	2,305.46
Net basic tax	\$ 576.36
	[10]
	Determined
Total Gross taxes (basic and additional)	\$ 45,831.87
Gross basic tax	5,946.37
Gross additional tax	\$ 39,885.50
Credit for gift tax	9,091.63
Net additional tax	\$ 30,793.87
Net basic tax	576.36
Total net estate tax	31,370.23
Amount assessed as shown on return	8,826.05
Deficiency	\$ 22,544.18

The deficiency bears interest at the rate of 6 per cent per annum from 15 months after the de-

cedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Upon receipt of a waiver or upon the expiration of 90 days from the date of this letter if a petition is not filed with the Board of Tax Appeals, the deficiency will be assessed.

Credit for gift taxes paid has been allowed hereinabove in accordance with the following computation:

Computation of Gift Tax Credit

Gift taxes on gifts made by decedent in calendar year 1938 amounted to the sum of \$7,547.06. The value of all of the gifts made in 1938 has been finally determined to be includible in decedent's gross estate as explained hereinabove, therefore, the entire amount of said gift taxes is allowable as a credit against the estate taxes, proportioned between the basic and additional estate taxes. \$7,547.06

Of the gifts made by decedent in the calendar 1939 of a total value of \$50,150.00 for both gift and estate tax purposes, the value of the whole thereof, excepting one item of real property, valued at \$6,000.00, is finally determined to be includible in decedent's gross estate for estate tax purposes, as hereinabove explained. The total gift taxes for the calendar year 1939 amounted to \$5,374.12, and the portion thereof allowable as a credit against the estate taxes amounts to the sum of \$4,609.12, computed as follows:

4,609.12

Total value of gifts for calendar year 1939.....\$ 50,150.00

Less:

Exclusions (applicable to first gifts made by decedent in said calendar year 8,000.00

Net gifts taxed in calendar year 1939.....\$ 42,150.00

Less:

Gift of real estate not included in decedent's gross estate 6,000.00

Net value of gifts for calendar year 1939 included in decedent's gross estate\$ 36,150.00

The portion of the gift tax for the calendar year 1939 that is allowable as a credit against the estate taxes is computed thus:

\$36,150.00 (gift tax value of gifts included in the gross estate—less exclusions)

\$42,150.00 (total gift tax value of all gifts made in 1939—less exclusions)

multiplied by \$5,374.12 (total gift tax for 1939) equals \$4,609.12, the allowable gift tax credit.

Total gift taxes for 1938 and 1939 allowable as credit against the estate taxes\$ 12,156.18

The total gift tax value (less exclusions) amounts to the sum of \$178,872.03, arrived at thus:

Gross gift tax value of 1938 gifts included in estate\$152,722.03

Gross gift tax value of 1939 gifts included in estate 44,150.00
(Gift of real estate valued at \$6,000 not included)

Total\$196,872.03

Less:

Exclusions—1938\$10,000.00
1939 8,000.00 18,000.00

Total gift tax value (less exclusions) of gifts included in decedent's gross estate \$178,872.03

The total estate tax value of the same properties, computed in like manner, amounts to the sum of \$184,442.51. The total allowable gift tax credit of \$12,156.18 is to be apportioned between the basic and the additional estate taxes on the basis of the gift tax values, computed thus:

\$178,872.03 (gift tax value—less exclusions, of gifts included in estate)

\$347,077.90 (estate tax value of decedent's gross estate)

Multiplied by \$5,946.37 (the gross basic estate tax) equals \$3,064.55 (the amount of gift tax credit allowable against the basic estate tax.

The amount of said total allowable gift tax credit that is applicable against the additional estate tax, therefore, is the sum of \$9,091.63, arrived at thus:

\$12,156.18 minus \$3,064.55 equals \$9,091.63, said remainder not being in excess of the sum otherwise limited by statute.

(See sections 813(a) (2) and 936(b) of the Internal Revenue Code, as amended, and Article 9(a) of Treasury Regulations 80 (1937 edition) as amended).

[Endorsed]: U.S.B.T.A. Filed June 28, 1941.

[13]

[Title of Board and Cause.]

AMENDED PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols, IRA:90-D:CSW (C:TS:PDSF:MWB) dated May 22, 1941 and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual, with residence at 144 Funston Avenue, San Francisco, California, and is the executor of the estate of the late Adolph J. Koch on behalf of which this petition is filed. The return for the period here involved was filed with the collector for the First District of California.

2. The notice of deficiency (a copy of which is hereto annexed and marked Exhibit A) was mailed to the petitioner on May 22, 1941.

3. The taxes in controversy are estate taxes. Date of death is June 29, 1939. The deficiency asserted is \$22,544.18, the entire amount of which is in controversy.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In determining the gross estate of the decedent Adolph J. Koch, the Commissioner erroneously included therein the value of certain properties transferred by the decedent and certain cash gifts made by him in his lifetime to his son, George Koch, his grandson, Ralph J. Swickard, and to certain relatives, Mrs. V. Koch and Daisy Koch, all of which appear fully in items (a) to (f) of the statement attached to Exhibit A annexed hereto.

(1) That the Commissioner erroneously

determined that the foregoing transfers and gifts were made by the decedent in contemplation of death.

(2) That the Commissioner erroneously determined that the decedent with respect to the properties transferred by him in trust for his grandson Ralph Swickard as described under item (a) [14] of the statement attached to Exhibit A, reserved the power to alter, amend, revoke, or terminate said trust within the provisions of Section 811 (d) of the Internal Revenue Code.

(b) In determining the net estate of the decedent, Adolph J. Koch, the Commissioner erroneously disallowed as a deduction an additional sum of \$500 payable to Mrs. Angelyn Compton, housekeeper and nurse to decedent.

(c) In failing to allow as an additional deduction from gross estate the amount of attorney's fees incurred on this appeal consisting of one third of the saving effected on this proceeding.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The decedent Adolph J. Koch did not sustain a partial stroke in June 1938, nor was his physical condition impaired thereafter as found by the Commissioner but in fact he was in excellent health for a man of his age at the time the gifts and transfers were made and al-

most until the date of his death in June 1939. At the time of those gifts, and until a few months before his death, he was unusually active, was looking forward to travel, and was strenuously participating in fraternal and business affairs.

(b) At no time during 1938 and 1939 when the gifts were made did he entertain any thought of death and the gifts were motivated entirely by other controlling considerations and purposes associated with life, rather than with death, such as the desire to provide for the education of his grandson Ralph and to equalize the gift and to help his son George out in business.

(c) The discussions with his tax advisor cited by the Commissioner were held about ten years before his death and were in no way the motivating cause, dominant purpose, or inducing motive of the gifts.

(d) That the additional sum of \$500 payable to Mrs. Angelyn Compton was an enforceable legal liability against the estate at the date of death.

(e) That the petitioner has incurred a liability for attorney's fees of one third of the saving effected in this proceeding.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that no deficiency is due from the petitioner.

(Signed) VICTOR E. CAPPA

(Counsel)

Bank of America Building
San Jose, California [15]

State of California

County of Santa Clara—ss.

George Koch, being duly sworn, says that he, as executor of the estate of Adolph J. Koch, is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein; and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

(Signed) GEORGE KOCH

Subscribed and sworn to before me this 12th day of Aug., 1941.

(Signed) LESTER W. WELING [Seal]
Notary Public in and for the County of Santa Clara, State of California.

[Endorsed]: U.S.B.T.A. Filed August 16, 1941.

[16]

[Title of Board and Cause.]

ANSWER TO PETITION AND AMENDED
PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition and amended petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition and amended petition.

2. Admits the allegations contained in paragraph 2 of the petition and amended petition.

3. Admits the allegations contained in paragraph 3 of the petition and amended petition.

4(a)(1) and (a)(2), (b), and (c). Denies that the Commissioner erred in the determination of the deficiency as alleged in subparagraphs (a)(1) and (a)(2), (b), and (c) of paragraph 4 of the petition and amended petition. [17]

5(a) to (e), Inclusive. Denies the allegations contained in subparagraphs (a) to (e), inclusive, of paragraph 5 of the petition and amended petition.

6. Denies generally and specifically each and every allegation in the petition and amended petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,

F.T.H.

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD.

Division Counsel:

FRANK T. HORNER,

Special Attorney,

Bureau of Internal Revenue.

[Endorsed]: U.S.B.T.A. Filed Sept. 3, 1941 [18]

The Tax Court of the United States

Docket No. 108007

ESTATE OF ADOLPH J. KOCH, GEORGE
KOCH, Executor,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Gerald S. Chargin, Esq.,
for the petitioner.

Arthur L. Murray, Esq.,
for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Mellott, Judge: This proceeding involves a deficiency in estate tax in the amount of \$22,544.18. Respondent determined that decedent had made transfers, in contemplation of death and within two years prior to his death, of property having an aggregate value of \$204,442.51. He included this amount in gross estate under section 811 (c) of the Internal Revenue Code. Inasmuch as \$79,001.53 of the amount referred to had been transferred by decedent to a trust for the benefit of his grandson, this amount was also determined to be includible in gross estate under section 811 (d) of the Internal Revenue Code. Petitioner contends that neither determination is correct. [19]

Two other issues were raised by the pleadings.

determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL,
F.T.H.

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

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Two other issues were raised by the pleadings.

One relates to the refusal of the respondent to allow the deduction of \$500, alleged to be an additional sum payable to decedent's housekeeper and nurse. The other, not referred to in the notice of deficiency but set out in the petition, relates to an anticipated expenditure for attorney's fees in this proceeding. These issues appear to have been abandoned since neither is discussed by petitioner upon brief; but if they have not been abandoned they must be decided against petitioner for failure to present any evidence in support of them.

FINDINGS OF FACT

Adolph J. Koch, hereinafter referred to as the decedent, died testate on June 29, 1939, at the age of 84 years. He was then a resident of San Jose, California. His son, George A. Koch, is the duly qualified executor of his estate. An estate tax return was filed with the collector of internal revenue for the first district of California on October 19, 1939. It states that the "business or occupation" of decedent at the time of his death was "retired".

Decedent's wife, Elizabeth Koch, predeceased him. He was survived by a son, George A. Koch, and two grandsons, Kenneth Koch, the son of George, and Ralph J. Swickard, the son of his daughter, Hilda. Ralph's mother died at the time of, or shortly after, his birth.

The decedent and his wife, after the death of their daughter, supported in their household their grandson, Ralph, until he reached the age of seventeen or eighteen years, when he went to live with his

father, his stepmother and her son by a prior marriage. Decedent was very anxious that Ralph should have the best educational advantages and that he should go to Stanford University where his other grandson, Kenneth, was a student. Ralph entered Stanford University [19-A] in the fall of 1938, and on September 21, 1938, the decedent gave him a check for \$500 for his tuition. This amount is not in issue in this proceeding.

The decedent was a man of considerable means. Between 1913 and 1938 he made several gifts to his son George. In 1913 he gave him some flats, valued at \$30,000, for a wedding present. Between 1913 and 1930 he gave him at least \$10,000. In 1930 he gave him \$40,000 to enable him to go into the stock and bond business. None of these amounts is in issue in this proceeding. During the latter part of 1931 or the early part of 1932 decedent told his attorney that he was planning to make a gift to his son George of approximately \$100,000 in securities, because the latter had sustained substantial losses in the failure of the stock and bond firm of which he had been a partner. The attorney advised that because of the failure of the firm George had a contingent liability and would probably lose any property which might be transferred outright to him at that time. He therefore recommended that decedent make a will in which any property intended for George would be tied up so that his creditors could not reach it. Following this advice, the decedent, on February 23, 1932, executed a will

which provided that, in the event of his death, the inheritance intended for George would remain in a spendthrift trust.

After George was discharged in bankruptcy of debts amounting to about \$1,000,000, the decedent, on July 25, 1935, executed another document which, with codicils, became his last will and testament. He provided therein for three specific bequests, \$5,000 to his brother and \$1,000 each to his sister-in-law and niece. The remainder of his property was devised and bequeathed to his son George and his grandson, Ralph. Ralph's half was to be held in trust by George, the latter being directed to pay out of the income such amounts as [20] he should deem necessary for the support, maintenance and education of Ralph until he should reach the age of twenty one years, at which time one fourth of the trust estate was to be delivered to him. The trustee was given the power in his discretion to deliver the remainder of the trust property to the beneficiary at any time after he had reached the age of twenty five years, and, if he did not exercise this discretion, the trust was to cease and terminate when Ralph reached the age of thirty years, at which time he was to receive all of the trust property remaining in the hands of the trustee.

This will was amended by a codicil dated March 3, 1937, which made certain changes in the time when part or all of the trust estate was to be delivered to Ralph by the trustee.

On December 20, 1938, decedent made an absolute gift to his son of properties which, on the date of

the decedent's death had a value of \$79,290.98. On the same date decedent made a gift in trust for the benefit of his grandson Ralph of properties which, on the date of decedent's death, had a value of \$79,001.53. Decedent's son George was named as trustee in the trust instrument. Under its provisions he was directed to pay out of the income of the trust such amounts as he deemed necessary for the support, education and maintenance of Ralph until he became twenty one years of age, and thereafter he was to pay Ralph the income of the trust until he reached the age of twenty five, at which time all of the trust property was to be turned over to him and the trust was to terminate. No power to change, alter or amend the trust was reserved in the settler.

Decedent, during the month of January, 1939, made absolute gifts to George and Ralph of cash and other properties, the value of which on the date of his death was \$23,150 and \$21,000 respectively. [21]

The decedent paid Federal gift taxes on the gifts referred to above in the amounts of \$7,547.06 for 1938 and \$5,374.12 for 1939.

Additional codicils were added by the decedent to his will on December 24, 1938, January 18, 1939, and February 9, 1939. They referred to the specific bequests in his will of \$1,000 each to his sister-in-law and niece, and \$5,000 to his brother, stated that these amounts had been given to them on the respective dates, and that they were advancements made "in

lieu of" and "in payment of" the bequests during his lifetime.

After making these transfers, which amounted to \$209,442.51, the decedent retained, until the time of his death, cash and other properties having a total value of \$142,605.39.

About five or six years prior to his death, the decedent, while crossing a street in San Jose, California, was struck by an automobile. The injury sustained by him probably broke a muscle and caused an inside hemorrhage over his right hip. During the six or eight weeks following the accident, the attending physician withdrew from the injured side several quarts of fluid. The injury left the decedent with a large depression in his right side, and thereafter the side bothered him. At times he would say: "This automobile injury has come back on me." He complained of having a "rheumatism pain", and had an electric ring which he sat on and put around him. He said the ring soothed and helped him. Prior to the automobile accident the decedent had always enjoyed good health, had never been bedridden or hospitalized, and had seldom required the attention of a physician. [22]

On May 18, 1938, the decedent had a paralytic stroke, and, for a time, was unable to use his left hand and left lower extremity. He had fallen, while alone, but had managed to get to his bed where he was found by his housekeeper and nurse, who called the doctor. The nurse told the doctor that the decedent's son wanted him to visit the decedent every day so she could tell him (he residing in

another city) how his father was getting along. During the period from May 21 to June 23, 1938, the doctor visited the decedent twenty eight times. At the time of his last call, on June 22, 1938, decedent's left leg had improved and he was able to stand by the bed with the use of crutches for support. He was not able to walk unassisted at that time. For a while he had to have someone help him into his automobile when he went riding. His condition improved, however, and his limp "cleared up almost entirely."

Decedent was a member of the Knights Templar organization, and it furnished him with a wheel chair, which was kept in his garage. The wheel chair was used some; but decedent did not like to ride in it and his nurse did not like to push it. He was very independent, often refused proffered assistance, and at times walked without his cane.

After his illness in 1938 the decedent spent much of his time sitting on the porch of his home or in the front room, looking out of the window. He usually retired early and got up early. He was always in good spirits and never talked about death. He was a director of a building and loan association, and during the year 1938, missed only two of the monthly meetings of the directors. He participated actively in the discussions at these meetings. In the early part of 1939, he visited the offices of the association "a couple of times" and on at least one occasion told the counsel for the association that [23] he had walked down. The office was five blocks from decedent's residence.

During 1939, decedent shaved himself with an electric razor, and had his hair cut at a barber shop approximately once every three weeks. He frequently walked to the barber shop, which was a block from his home.

On the night before Christmas of 1938, decedent walked down to the Masonic Temple with his housekeeper and nurse. He personally attended to all the details of the Christmas breakfast of the Knights Templar organization, of which he was in charge, and took great pains to see that all of the tables were fixed right, that the ladies waited on the tables, and that the hams were cut right. He also made a little talk to the members. He attended the Christmas breakfast in a wheel chair. His nurse "took him down" to the Masonic Temple where the breakfast was served.

From June 22, 1938, until the date of his death the decedent was not treated by any doctor, except that on December 26, 1938, he received treatment for an inflamed eye.

The decedent died on June 29, 1939. The cause of death was an extra peritoneal hemorrhage due to rupture of the left hypogastric artery, which could have been caused by a fall in the bathroom the morning of his death. Contributory causes were chronic interstitial nephritis with cystic degeneration of the right kidney and senility. The contributory caused, other than senility, were revealed by an autopsy. The decedent had never complained of, or been treated for, the conditions disclosed by the autopsy.

The respondent determined that all of the gifts and transfers made by the decedent during the period December 20, 1938, to the date of his death, except the \$5,000 given to his brother, were made in contemplation of death. He therefore increased the gross estate by the aggregate amount thereof (\$204,442.51)

The transfers by the decedent, aggregating \$204,442.51, were made in contemplation of death.

[24]

OPINION

The principal issue is whether respondent erred in determining that the transfers were made in contemplation of death and hence that the value of the property transferred is to be included in gross estate under section 811 (d) of the Internal Revenue Code.¹ The question is essentially one

¹Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does

of fact, to be determined from a consideration of all the pertinent facts and circumstances, *First National Bank of Boston v. Commissioner*, 63 Fed. (2d) 685; *Flack v. Holtegel*, 93 Fed. (2d) 512; but the respondent has the advantage of two rebuttable presumptions—one, that his determination is correct, *Hickwire v. Reinecke*, 275 U. S. 101; *Welch v. Helvering*, 290 U. S. 111, and the other given by the statute, since the transfers were of a material part of decedent's property and were made by him without consideration within two years prior to his death. [25]

Finding has been made that the transfers were in contemplation of death. Conclusion must therefore be reached that the respondent committed no error in including the value of the property in decedent's gross estate. The evidence, in our judgment, clearly supports the finding, independent of the presumptions to which reference has been made. A brief resume of the evidence and the principles established by decided cases will not be amiss.

not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

“Contemplation of death”, as used in the statute, requires that the triers of fact apply a subjective test and attempt to ascertain from the available facts “the state of mind” of a donor whose lips have been sealed by death. *United States v. Wells*, 283 U. S. 102. Decided cases, at best, are of comparatively slight aid; for the facts are as varied as the personalities of the donors. Collectively they suggest that all proper evidence, even circumstantial, should be considered, *Farmers’ Loan & Trust Co. v. Bowers*, 68 Fed. (2d) 916, certiorari denied 293 U. S. 565; and “hardly any fact is too minute for consideration.” Paul, *Federal Estate and Gift Taxation*, p. 244 and note. “The differentiating factor must be found in the transferor’s motive. * * * the motive which induces the transfer must be of the sort which leads to testamentary disposition.” “There can be no precise delimitation of the transfers embraced within the conception of transfers in ‘contemplation of death’ as there can be none in relation to fraud, undue influence * * * or other familiar legal concepts * * *.” *United States v. Wells*, supra. [26]

What was decedent’s motive in making transfers of approximately 60 percent of his properties when he was nearly 84 years of age? Petitioner urges that the purpose of the transfer to the grandson, Ralph, was to make certain that he would get a college education at Stanford University and to set him up in business later. The purpose of the transfer to the son, George, is said to have been to carry out a policy, long pursued by decedent, of

making liberal gifts to him during his lifetime and to equalize the gifts to him with the gifts to the grandson. No attempt is made to explain his motive in advancing the time of payment of the \$1,000 bequests to his sister-in-law and niece. Respondent insists that the transfers were made at a time when advanced age and incapacitation must have suggested to decedent that the end was drawing near, that they were strictly in accordance with the intention indicated by him in his last will, and that they were testamentary in character.

There is no dispute concerning the value of the transferred properties. Twelve witnesses, including three physicians, several neighbors of decedent, his son, his attorney, and his housekeeper and nurse, testified at length with reference to his physical condition, his activities, and statements made by him both before and after the transfers were made. There is some conflict in the testimony of these witnesses with reference to whether the decedent was hit on the right or the left side at the time of the automobile accident, and the nature of his illness in 1938. The evidence indicates that the decedent's injuries as a result of the automobile accident were to his right side and we have so found. It is also clear that the decedent suffered a paralytic stroke in May, 1938, which affected the left side of his body; and, while he had partially recovered from it, the after effects, together with the disability resulting from the automobile accident and general senility, had caused him to become pretty much of an invalid. [27]

The burden was on the petitioner to show that decedent's gifts in December, 1938, and January, 1939, were motivated by impulses primarily associated with life. *United States v. Wells*, *supra*. There is very little evidence in the record upon which to rest a finding that any of his gifts were in this category. The implication from most of the evidence is to the contrary. In his will executed in 1935, decedent, after making specific bequests of \$1,000 each to his sister-in-law and niece and \$5,000 to his brother, provided that one half of the residue of his estate should go to his son and that the other one half should go to a trust created for the benefit of his grandson, Ralph. The gifts made by him in December, 1938, and January, 1939, made the same disposition of approximately sixty percent of his properties. His sister-in-law, niece and brother each received the same amount that would have been received under the will; and absolute gifts of securities having a value of \$102,440.28 were made to George, while securities having a value of \$100,001.53 were transferred to, or for the benefit of, Ralph.

The time and manner in which the transfers were made indicate that they were substitutes for testamentary dispositions of decedent's property. In the case of the gifts to his sister-in-law, niece and brother, he was careful to point out that they were "in lieu of" the provisions made for them in his will. It was unnecessary to make similar statements concerning the gifts to his son and grandson since the will provided that each was to receive one half of

the residue of his estate and any transfers made to them during decedent's lifetime merely diminished the residuary estate. It is a significant fact, however, that the decedent followed the intention expressed in his will of dividing his property, per stirpes. [28]

Examining in more detail the contentions made by petitioner and the evidence relied upon in support of them, it will be noted that Ralph entered Stanford University in the fall of 1938, at which time decedent gave him a check for \$500 to pay his tuition. Ralph's age at that time is not shown; but it is obvious he was less than twenty-one. Decedent must have known, in the latter part of 1938, that Ralph had no immediate need for any large sum of money and that several years would elapse before he could embark on a business career. So long as decedent lived he was in a position to furnish Ralph with funds required, either for his education or for business. He had made adequate provision in his will to take care of Ralph's needs after his death. We do not doubt that decedent wanted Ralph to become "a good business man and not a fiddler," as some of the witnesses stated, and that his intention was to make Ralph "absolutely independent". That, however, does not satisfactorily explain why he should have advanced the time of enjoyment by Ralph of such a substantial portion of his property. The record is devoid of any intimation that he was endeavoring to school his grandson in the handling of money and the inference is to the contrary; for the major portion of the

property given to him was to be administered by his uncle, as trustee, and the trustee was to pay out of the income only such amounts as he should deem necessary for the boy's "support, education and maintenance." Inasmuch as the trust then created for Ralph was in essence the same as the trust which was to be set up after decedent's death, it is difficult to see why it was created, if it were not for the reason determined by the respondent.

[29]

The gifts to the son seem to be in the same category. Petitioner urges that one reason for the gifts to him was decedent's desire to give him an amount equal to that given to Ralph. An intention to divide his estate equally between George and Ralph is clearly evidenced by the terms of decedent's will; and the fact that he provided each should receive approximately the same amount of his property when he made the gifts in December, 1938, and January, 1939, shows that there was no change in this plan. This, however, does not explain the decedent's motive in advancing the time of the enjoyment of George's share of his property. The contention that the gifts to the son were but a continuation of a policy of more than thirty years of making liberal gifts to him is also not proved. It is true that decedent had given George \$30,000 as a wedding present in 1913, \$10,000 some time between 1913 and 1930, and \$40,000 when he went into business in 1930; but there is no evidence that the decedent had made any gifts to George after

1930 until the gifts now in issue were made. In our judgment the gifts to George in 1938 and 1939 cannot be attributed to any long continued policy or practice. They, like the gifts to Ralph, appear rather to have been made as substitutes for and in lieu of testamentary disposition of his property.

Petitioner attempted to picture decedent as being in good physical condition during the latter part of 1938 and the early part of 1939 when the gifts were made. Some of the evidence relied upon is that with reference to the Christmas party of the Knights Templar, the fact that he attended some of the meetings of the board of directors of the building and loan association, made some trips to the barber shop, was able to get about his home, and took a few automobile rides. An examination of all of the evidence in connection with [30] these events militates against petitioner. Thus, the record shows that the breakfast was attended in a wheel chair and that the decedent was then suffering from the effect of the partial stroke as well as from the earlier automobile accident. On some of the occasions when he attended the director's meetings he was brought there in an automobile furnished by the association. When he determined to make the gifts in December of 1938 he had George secure the stocks and bonds from his safety deposit box and bring them to him at the house. He then had George call his attorney on the phone and in response thereto the attorney called at decedent's home to discuss with him the details of

the trust which he intended to create for Ralph. On at least some of the trips to the barber shop the decedent was assisted by his housekeeper and nurse. It is no doubt true that decedent was of a jovial disposition and did not discuss death at any length with those with whom he associated; but he must have known that the sands of life were fast running out, that his life expectancy was short and that it was highly desirable his house be put in order. He was almost 84 years of age when the gifts were made—his exact age at the time of death was 84 years, 3 months and 5 days—and was spending most of his time in a chair on the porch or at the front window of his home. The normal activities of a busy life had all but ceased. He was tax conscious, as is indicated by the fact that he deliberately divided the gifts between 1938 and 1939 in order to minimize his tax liability. It would be closing our eyes to the obvious to hold that thoughts of death did not enter into his mind and motivate the transfers. While age alone is not a decisive test, *Flack v. Holtegel*, *supra*, it may well tip the scales where other facts strongly point to testamentary disposition. [31]

The present record, in our judgment, supports respondent's determination that the gifts made by decedent in December, 1938, and January, 1939, were in contemplation of death as that term is defined in *United States v. Wells*, *supra*. We therefore respectfully decline to disturb it. In view of the conclusion which has been reached, it is unnecessary to discuss or decide the second question, i. e.,

whether the value of the property transferred in trust on December 20, 1938, should be included in the gross estate of decedent under the provisions of section 811 (d) of the Internal Revenue Code.

Judgment will be entered for the respondent.
Enter:

Entered Apr 13 1943 [32]

United States Board of Tax Appeals
Washington

Docket No. 108007

ESTATE OF ADOLPH J. KOCH, GEORGE
KOCH, EXECUTOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered April 13, 1943, it is

Ordered and Decided: That there is a deficiency in estate tax of \$22,544.18.

[Seal] (S) ARTHUR J. MELLOTT
Judge.

Enter:

Entered April 14, 1943. [33]

The Tax Court of the United States

[Title of Cause.]

REPORTER'S MINUTES

Hearing at Santa Clara County Courthouse, Superior Court Room No. 4, San Jose, California, on the 21st day of November, 1942, at 9:45 o'clock A. M.

The above-entitled proceeding came on for hearing on this 21st day of November, 1942, before the Honorable Arthur J. Mellott, Judge, The Tax Court of the United States, at San Jose, California, pursuant to notice of hearing heretofore given, whereupon the following proceedings were had, to-wit:

Appearances:

GERALD S. CHARGIN, Esq.,

(507 First National Bank Building, San Jose, California) appearing as counsel for petitioner.

ARTHUR L. MURRAY, Esq.,

(508 Sharon Building, San Francisco, California) Special Attorney for the Commissioner of Internal Revenue. [35]

Whereupon

GEORGE ADOLPH KOCH

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: What is your full name, please? [40]

The Witness: George Adolph Koch, K-o-c-h.

Direct Examination

By Mr. Chargin:

Q. Mr. Koch, where do you reside at this time?

A. I am at the Durant Hotel in Berkeley.

Q. And what is your principal occupation?

A. I am manager of the Durant Hotel.

Q. And you are the son of Adolph Koch?

A. That's right.

Q. When did your father die?

A. I didn't get that.

Q. When did your father pass away?

A. Why, I haven't the exact date; in '39.

Q. Sometime in June, 1939?

A. That's right.

Q. And where was he living at the time of his death?

A. At 285 South Third Street, San Jose.

Q. 285 South Third, San Jose. Who was living with him at that time, if anybody?

A. Well, Mrs. Compton was housekeeper for him.

Q. Mrs. Compton was a housekeeper at the place? A. That's right.

Q. That property was his own property?

A. Yes.

(Testimony of George Adolph Koch.)

Q. And your mother had predeceased your father some [41] time? A. That's right.

Q. When did she pass away?

A. Oh, five or six years before. I just don't remember.

Q. I see. And so your father was living alone at that home, other than the housekeeper?

A. That's right.

Q. (Continuing) At that time. And now, did your father give you any gift of money or property during the year 1917? A. Yes.

Q. How much in 1917, roughly speaking?

A. Well, he gave me \$40,000.00.

Q. Forty thousand? A. That's right.

Q. What year was the forty thousand dollars?

A. You asked me about 1917. If you will let me explain.

Q. All right, explain. You say then that he gave you \$40,000.00 in 1917, is that correct?

A. Well, I just don't remember the date. I was in the stocks and bond business, if that is what you refer to, when he made me a gift of the money.

Q. No. I don't mean to confuse you, but I believe [42] that question of a gift to go in business was subsequent to that time, considerably.

Mr. Murray: If Your Honor please, I will object to some of these questions as being too leading.

The Judge: Overruled.

By Mr. Chargin:

Q. Well, I will put it this way: When you

(Testimony of George Adolph Koch.)

went into the stocks and bond business, how much did your father give you?

A. Forty thousand dollars.

Q. And have you any idea what year that was?

A. That was in around 1930 or '31.

Q. Nineteen twenty what? A. 1930, '31.

Q. All right, 1930 or '31. And that was \$40,000.00. And what business did you go into?

A. A brokerage business.

Q. With whom? A. Gorman & Kaiser.

Q. Gorman & Kaiser. And you were what, a partner in that business?

A. I was a partner.

Q. Now, I will ask you this: When, about, did you get married?

A. Married the first time in 1913. [43]

Q. 1913. Do you know whether or not you received anything from your father at or about that time?

A. A little later on he made me the present of a set of flats?

Q. A set of flats. And where were these flats located? A. 144 Funston Avenue.

Q. And that is in San Francisco?

A. That's right.

Q. What was the value of those properties?

A. Thirty thousand dollars.

Q. Thirty thousand dollars. After 1913 did your father give you any further gifts?

A. Not that I recall at present.

(Testimony of George Adolph Koch.)

Q. Not that you recall. Do you recall any gift from 1913 to 1930, at one time of ten thousand dollars?

Mr. Murray: If Your Honor please, I object to that as being definitely leading.

The Judge: Well, it is a little leading, but I think it is perhaps preliminary. The objection will be overruled.

By Mr. Chargin:

Q. You may proceed.

A. These things I do recall, yes, even if they are leading. My father did give me a gift of ten thousand [44] dollars.

Q. When did he give you that, have you any idea?

A. Oh, I don't remember; it was between the time he gave me the flats and I got the other money from him.

Q. How was it given to you?

A. It was given to me in cash.

Q. I see. At one time? A. Yes.

Q. I see. What was the condition of your father's health in 1938 and '37?

Mr. Murray: We object to that, if Your Honor please, calling for conclusion of the witness.

Mr. Chargin: I will put it the other way:

(Testimony of George Adolph Koch.)

By Mr. Chargin:

Q. Was your father suffering from any illness in 1937?

Mr. Murray: Object to that, if Your Honor please, calling for conclusion.

The Judge: Well, he may state facts, whatever they are, of what he, himself, observed as to his apparent condition.

A. You want me to state the facts? I never had ever seen my father sick in his life, and he never had a sick day or a doctor in his life that I ever knew of until he was hit with an automobile. [45]

By Mr. Chargin:

Q. When was he hit with an automobile?

A. Oh, I just don't remember the date. You have the records of it there. A few years, five or six or seven years before he died.

Q. Some seven years before he died?

A. Yes. But I never saw my father ever have a sick day in his life.

Q. And do you know the circumstances under which he was hit?

A. If I can recall it, he was going to some kind of a Masonic meeting or to a banquet up here on San Pedro and Market Street. He was always a man that was very active and rushing around, and he rushed across the street and he didn't see the automobile and it hit him. Those are the only facts that I know of.

Q. Was he a pedestrian, walking?

(Testimony of George Adolph Koch.)

A. Yes, he was walking.

Q. I see.

A. I might say along that line, if you want facts, that I believe Mrs. Compton wanted to get a doctor, and he wouldn't have a doctor. Then the insurance company came to see him and he said "I don't want to see you." They wanted to make a settlement. He says "I don't ask for any settlement." But I believe they forced \$500.00 on him, but he [46] gave it away to charity or something. I just don't remember the facts.

Q. What portion of his body was injured at that time?

A. He was hit right back here (indicating left hip) and I didn't realize how bad he was hurt until Mrs. Compton showed me when he was in bed one time. He had quite a hole in his back there. I was really surprised. You could put your fist in it. But that came from that automobile injury

Q. Did that injury give him any subsequent trouble or bother?

A. Well, he used to say—He said "There is nothing the matter with me," he said, "this automobile injury has come back on me." That is the only thing that he ever mentioned.

Q. Did you visit your father very often in 1938 or '39?

A. I moved to San Francisco in 1908, and I made an average trip to see my mother and father of twice a week during those thirty years. And I

(Testimony of George Adolph Koch.)

kept that up continually during the last thirty years. Sometimes I came oftener than that. When my mother was sick I came down every night.

Q. Was your father—what was his business activity during the years 1937 and '38 and '39, if you know?

A. Well, he naturally had his own business to take care of, [47] but he was active in the Building & Loan Association.

Q. Which Building & Loan Association?

A. San Jose Building & Loan Association.

Q. San Jose Building & Loan Association. And what was his capacity with regard to that association?

A. He was a director, then.

Q. He was a director there?

A. He had been president for years, and then they sold the institution; they kept him on for five years for good will, and then the institution went through the wringer, like a lot of institutions, after he left, so at his age they asked the man to come back and take a directorship and an active interest to put the institution back on its feet again. And today it is one of our leading institutions and in good financial shape. He was over eighty years of age at that time.

Q. Your father was eighty years of age when he went back?

A. Over that.

Q. (Continuing) To active participation?

A. I think he was eighty-two.

Q. And what was his position on the Board?

(Testimony of George Adolph Koch.)

A. I don't know. I think he was a director.

Q. Just a director. Now, with reference to the gift that you received to go in the stock and bond business: [48] Would you please relate as to what took place with regard to that business? Did that business fail?

A. Well, I was a partner, and there were thirteen of us. Mr. Gorman had 51 percent interest. He took a position on a stock called General Theaters Equipment, a confidential position, where in a pool we were to keep the price of the stock up to 60—which they didn't pool in those days—the stock dropped to four or five and the institution failed. So, that is the story.

Q. And when you failed did you have any personal liability under that setup?

A. Well, we all had a personal liability, and as partners, and we all went through bankruptcy. The firm went—we went through bankruptcy for a million dollars individually, apiece.

Q. And what year was that you went through bankruptcy?

A. Oh, it took about six or seven years to clean it up. I don't remember.

Q. Do you know whether your father had made any wills during that time, about that period, around '30, '35, for or on your behalf?

A. Well, he had made a will, but I didn't ask him what his will was. But during that time I

(Testimony of George Adolph Koch.)

had a brother-in-law whose father was very ill, and my brother-in-law was [49] also in the stock and bond business, and his attorney made a spendthrift will for him, and I told my father about it, and my father, to protect me, made a spendthrift will at the time covering me. I believe after he died he changed that spendthrift will to the will that is on record today.

Q. You mean after that time, not after he died. After that time he changed his will again?

A. I mean to say after the bankruptcy was settled.

Q. Yes.

A. He changed the spendthrift will to the will that is on record today.

Q. I see. A. Is that clear? [50]

Q. On or about December 28th, 1938, did your father give you any money? A. Yes.

Q. All right. And how much was it?

A. Well, I just can't recall the amounts. I'll say this, if I can tell my story it would be better, Judge.

Q. No, haven't you an idea of about how much it was?

A. Yes and no. I will say this: My sister died at childbirth and left a boy, and my father left this boy and myself money, and on account of difficulties with the boy's new mother, my father and the step-mother had difficulties on account of the boy being

(Testimony of George Adolph Koch.)

educated. The boy lived with my mother and father until he was, oh, seventeen or eighteen years of age. [51]

Q. What was this boy's name?

A. Ralph Swickard.

Q. And what relation was he to you?

A. He is my nephew.

Q. Yes.

A. And this boy was closer to my folks than I was. It was one of those things where my mother and father took it much to heart. My sister died and they wanted him to have everything, especially what my boy has. I have a boy and he went to Stanford.

Q. Apart from your own matters.

A. All right.

Q. What happened about the delivering to you of any money at that time, at or about that time?

A. Well——

Q. Or securities?

A. He wanted this boy to have a good education, and he wanted him to go to Stanford. So he gave him some securities to take care of his education.

Q. Yes.

A. At the same time he said he wanted to give me a like amount, and that was the amount that was given to me the first time.

Q. You don't recall the amount?

A. No, I don't know what it was. [52]

(Testimony of George Adolph Koch.)

Q. Who was present when these were given to you?

A. I don't think there was anybody present that I know of. I don't remember anybody.

Q. Well, where were they given to you, what place, at the home or uptown, or where?

A. Why no, he had a safe deposit box. I already had his key. And I just don't remember, I suppose we went down to the bank, and we took the securities that way. I got them and transferred them. I just don't remember how we handled them.

Q. Was there anything in writing at that time, made at that time? A. Not that I remember.

Q. Not that you remember. Did he give anything to the boy, the grandson, at that time?

A. In the way of money or securities?

Q. Or securities, yes.

A. Why, I just—I don't remember. I believe there were securities transferred at that time.

Q. I see.

A. I think there was some money given at that time, too.

Q. In December of 1938, was your father able to get about? A. Yes. [53]

Q. Or was he bedridden? He was able to get about? A. That's right.

Q. Did he own an automobile at that time, during the year '38? A. Yes.

(Testimony of George Adolph Koch.)

Q. Was he able to drive it, himself?

A. Yes.

Q. What kind of an automobile was it?

A. Dodge coupe.

Q. Dodge. Did you ever see him driving the automobile? A. Sure.

Q. Do you know whether he ever drove the automobile in 1939?

A. I don't remember. I think he drove it right up until the time he was sick. He had been up to see me in San Francisco just previous to that.

Q. What time was that when he came up to see you and drove his car?

Mr. Murray: Well, just a minute. I object to that question, when you say "he drove his car."

By Mr. Chargin:

Q. All right, what time did he come up to see you, do you know?

A. I can't remember. Just previously to the time [54] he got sick.

Q. Well, when did he get sick?

A. Well, I don't just recall the exact date. It is on record there.

Q. When he came to see you how did he get to San Francisco? A. Drove his automobile.

Q. He drove his automobile. And are you able to state whether in '38, or '39, or '37, or when?

A. I can't tell you; it was right before he got sick.

(Testimony of George Adolph Koch.)

Q. Well, how long? I will put it this way: With reference to time, how much previous to his death was this?

A. I wouldn't be able to say, I don't remember. It is so far back.

Q. Wouldn't be able to say. With regard to the transfers made in January of 1939, do you recall the circumstances under which they were made to you?

A. Well, I suppose the same way as the other transfers; they were just transferred to me, given to me.

Q. Do you know how much, Mr. Koch?

A. How much?

Q. Yes, how much it was in January, about, that you received, in 1939?

A. No, I don't. I just don't recall that.

Q. You do not recall. Do you know how much money [55] your father left at the time of his death, other than the transfers made to you and your nephew?

A. Oh, roughly I would say one hundred and twenty-five to fifty thousand dollars.

Q. One hundred and twenty-five to fifty thousand dollars. That is additional, besides the money that was given to you and to——

A. That's right.

Q. (Continuing) Ralph Swickard?

A. That's right.

Q. Where is Ralph today?

(Testimony of George Adolph Koch.)

A. Well, he was inducted, went to Monterey, and I heard that he was up to Pittsburgh, up to Camp Pittsburgh, so I drove up there last Sunday to see him, and waited for a couple of hours, and they were unable to get him. And I got a letter from him yesterday—he didn't mention where he was going or what he was doing—but I understand that is a point of embarkation. His mother, I called her up, she told me that he said he thought he was on his way to Australia. They will only give the boy a four-hour furlough.

Q. He is not available, then, for this proceeding?
A. I couldn't even see him.

Q. All right. When you say "she" you referred to his mother?
A. His stepmother. [56]

Q. His stepmother. And where is his father at the present time?

A. His father died two days before he was inducted.

Q. All right. His father is now dead. To recall the circumstances or what happened to your father on or about the day previous to his death, where were you on the 28th of June, of 1939, with regard to your father?

A. Well, I wouldn't say the exact date, but—you say the day before he died?

Q. Yes, a day or two before his death.

A. Well, I came down, oh, several days before. I am pretty sure I came down the day before he died.

(Testimony of George Adolph Koch.)

Q. Yes.

A. And I was in San Francisco and I was manager of the Whitcomb Hotel, I was there at the time, and I came down that night like I had been down several nights before, and days before.

Q. And where was your father when you came down to see him? A. Pardon me?

Q. Where was your father when you came down to see him? A. He was in the front room.

Q. Yes. Was he up and around or bedridden, or what?

A. No, he wasn't in bed; he was in the front room, [57] sitting in a chair.

Q. What was his condition, as to his health, then?

Mr. Murray: Object to that, if Your Honor please, except from observation.

Mr. Chargin: Well, all right.

By Mr. Chargin:

Q. What did you observe as to his condition at that time?

A. Well, I didn't observe that he was any different than he had been previous, on the days that I had seen him before.

Q. All right. When did he die, and under what circumstances?

Mr. Murray: Object to that "under what circumstances."

The Judge: Were you present?

A. Yes. Mrs. Compton phoned me, she said

(Testimony of George Adolph Koch.)

"Your father wants you to come right away." So I got in the machine and came down. And he was in bed, and he said "George, I can't stand this any longer," he says, "get Dr. McGinty," he said, "to take me to the hospital and relieve me of this pain." I think he had urine pressure. But he said, "You will have to do something for me." So I went next door and called Dr. McGinty, and the doctor said, "Well, what do you want to do, George?" And I said, "Well, I want— [58] my father wants to be relieved." He said, "Yes." He was right there talking to us. He said, "Yes, Doctor, I want to be relieved." So, we called an ambulance and we took him to the San Jose Hospital, and I went with him.

Q. I see. And do you know what date that was that he was taken to the San Jose Hospital?

A. No, I haven't the record of the date.

Q. How soon after that time that he was taken to the hospital did he pass away?

A. Well, I see the doctor just came in——

Q. You were there?

A. Four or five hours; I just don't remember.

Q. Four or five hours. In other words, we want you to testify to whatever you know about the transaction, that is all.

A. All right.

Q. We will have other witnesses.

A. Four or five hours.

Q. Four or five hours. And what time of the day or night was he taken to the hospital?

(Testimony of George Adolph Koch.)

A. In the morning about nine or ten o'clock.

Q. I see. And you say that when you first got there he was in bed. Do you know how long previous to that time he had been in bed?

A. No, I don't. [59]

Q. When he said to you he couldn't stand it any longer, what was he referring to?

A. Well, I think he had pressure, urine pressure.

Q. I see. He was complaining to you about being ill? A. Pardon me?

Q. He was complaining to you about being ill?

A. Well, he didn't—No, he said he was in pain. He didn't say he was ill, he said he was in pain.

Q. Yes. Did he tell you how it came about or anything, did he tell you how it came about, how he happened to have pain?

A. No, he didn't say anything.

Q. So your testimony is that he died the following day, or that same day?

A. He died that day.

Q. Yes. In the afternoon or morning?

A. Oh, I don't just remember.

Q. Were you a trustee for your nephew, Ralph Swickard? A. That's right.

Q. And a trustee of what?

A. Well, trustee of his securities.

Q. How much were they, any idea?

A. Now or then?

(Testimony of George Adolph Koch.)

Q. Then. [60]

A. Whatever the trust was at the time. I don't remember. I think it was around seventy-five or eighty thousand dollars.

Q. Seventy-five or eighty thousand dollars. And do you know when you became a trustee, about?

A. No, I don't.

Q. You don't. Was that trust oral or was it evidenced by a writing?

A. It was a written trust.

Q. How did it come about that you put it in writing? A. I didn't have it put in writing.

Q. What were the circumstances?

A. My father did.

Q. Your father did. Well, who did it, if you know, and when? A. Faber Johnston.

Q. I see. And did you sign the trust?

A. I don't remember.

Q. You don't remember. Do you know whether he went to Mr. Johnston's office?

A. Oh, he went there many times.

Q. Many times. Who is Mr. Johnston?

A. Mr. Johnston?

Q. Yes. A. He was my father's attorney.

[61]

Q. He was your father's attorney. How long was he attorney for your father?

A. Why, I guess all his life; his father was his attorney, I think, previous to the time that he was. [62]

DR. LELAND ALONZO CHILDERS

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: And your full name?

The Witness: Dr. Leland Alonzo Childers.

Direct Examination

By Mr. Chargin:

Q. Dr. Childers, what is your profession?

A. Practitioner of medicine and surgeon.

Q. You are a surgeon and doctor of medicine.

How long have you so been? [63]

A. I have been practicing in San Jose fifteen years and a half.

Q. And are you licensed, duly licensed to practice medicine in the State of California?

A. I am.

Q. And for how many years?

A. Fifteen and a half years.

Q. Fifteen. And previous to that time?

A. Shrevesport, Louisiana; one year.

Q. And from what university did you graduate?

A. Tulane University, Louisiana, in 1926.

Mr. Chargin: Now, just preliminarily, this is not for the purpose of introducing testimony from this witness. This man we would like to use as an expert to pass upon some testimony that will be elicited later on with regard to blood pressure and pulse of the decedent. There will be evidence brought out in the trial by subsequent doctors.

(Testimony of Dr. Leland Alonzo Childers.)

By Mr. Chargin:

Q. Now, Doctor, if we have testimony in this case that would indicate that a man 83 or 84 years of age had a pulse of about 78, would it be possible under that condition to be suffering from a stroke at that time, with a pulse of 78?

A. A pulse of 78 wouldn't have any bearing—— [64]

Mr. Murray: (Interposing) Just a minute. We will object to that as assuming facts not in the record; and furthermore on the basis that it calls for a conclusion that Your Honor is called upon to make, the matter of whether this man could have a stroke or whether he couldn't is only one point in the evidence in issue before this court. And I object to that as calling for conclusion and assuming facts not in evidence.

Mr. Chargin: Well, I am faced with this situation, if the Court please: I realize that it is certainly proper; this is all medical testimony first as to what will take place, and then have the expert give his opinion as to the condition, based upon that evidence. However, the doctor has to immediately leave, and I want to get him in here as an expert this morning some time. He has to be in San Francisco before twelve o'clock.

The Judge: Well, if I understand you correctly, you expect to show by evidence subsequently that at least one of the diagnoses showed a pulse of 78.

(Testimony of Dr. Leland Alonzo Childers.)

Mr. Chargin: Seventy-eight. And also a blood pressure, as follows: Systolic 145 and Diastolic 75.

The Judge: And you wish to elicit from this witness his opinion as to whether or not one having those symptoms would, in his opinion, have been suffering at that time from a stroke, is that correct? [65]

Mr. Chargin: That is correct; that is correct, Your Honor.

The Judge: I will permit him to answer.

Mr. Murray: May I have an exception?

The Judge: The exception may be noted.

By Mr. Chargin:

Q. Doctor, assuming that a person 83 or 84 years of age has a blood pressure, systolic of 145, diastolic of 75; a pulse of about 84; temperature 98.2, is it possible for him at that time to be suffering from a stroke?

A. It is not. The blood pressure evidence is the only evidence that we consider relative to a stroke. You asked about a pulse rate of 84 per minute, I believe. The pulse rate would have no bearing whatever upon a stroke. The mechanism of a stroke, or apoplexy, as it is commonly called, is an elevated blood pressure. The evidence given here, a systolic blood pressure of 145, diastolic—

Q. Of 75.

A. (Continuing) of 75, is considered as a normal blood pressure. So, it would be impossible with that reading at that moment, that that was taken, for the man to be suffering from a stroke.

(Testimony of Dr. Leland Alonzo Childers.)

The temperature was also mentioned. Ninety-eight——

Q. Ninety-eight point—— A. Two? [66]

Q. 98.2.

A. The temperature wouldn't have any bearing, either; that is a normal temperature.

Q. That is a normal temperature?

A. Yes.

Q. Approximately what would you have to have in blood pressure to have a stroke, how high a reading? A. At least 200.

Q. About 200?

A. 200 systolic and relatively low diastolic; say 200 over 110, or 98, something like that, giving a high pulse pressure when one figure is subtracted from the other.

Mr. Chargin: That is all. You may be excused.

The Judge: Just a moment.

Cross Examination

By Mr. Murray:

Q. Doctor, I would like to ask you whether this opinion you have just given was based entirely on those figures at that moment?

A. At that moment, yes, sir.

Q. Then——

A. As a hypothetical case given.

Q. A hypothetical case. And then it would be your opinion, would it not, that that did not necessarily govern some other circumstance that may have prevailed just before [67] or just after such a time?

(Testimony of Dr. Leland Alonzo Childers.)

A. In order for the blood pressure to be elevated to the dangerous degree or approaching that of a stroke, it would require some severe activity of some sort.

Q. Yes, but it doesn't necessarily follow that that couldn't happen, is that right?

A. That's right. If the man were under some undue stress or emotion or exercise, or something of the sort. However, if he were remaining quiet, it is my opinion that the blood pressure would not be materially influenced from this which was stated.

Q. Doctor, I would like to ask you this: Would it not be possible for blood pressure to immediately descend from the 200 you were speaking about, right after a stroke?

A. No. There wouldn't be any material descent in the blood pressure following a stroke.

Q. You mean not at all?

A. There would be some, yes, sir, but it wouldn't descend to 145, unless the man were in complete collapse.

Q. You mean it never would again, or just immediately after?

A. Immediately afterwards. The chances are the pressure would be decreased somewhat from that. As we know the mechanism of a stroke is a breaking of the artery in the brain, that would no doubt lower the pressure to a [68] certain degree. In many cases death ensues at that time, and naturally the blood pressure goes straight on

(Testimony of Dr. Leland Alonzo Childers.)

down to zero, never does return. But where the stroke has not been fatal, the chances are the blood pressure would not be a great deal different. We will say in a hypothetical case of a man having a blood pressure of 220, he has a stroke, immediately afterwards if you would take the pressure maybe it would be down to 180. There would be an elevated blood pressure. It would not be a normal blood pressure.

Mr. Murray: That is all.

Redirect Examination

By Mr. Chargin:

Q. That blood pressure as indicated, would be normal for a man his age? A. 145 over 80?

Q. Yes.

A. Yes, that would be a normal blood pressure.

Mr. Chargin: All right. No further questions.

The Witness: Thank you.

(Witness excused.)

Mr. Chargin: Mr. Johnston, Faber Johnston.

Whereupon

FABER L. JOHNSTON

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified [69] as follows:

The Clerk: Give your name, please.

The Witness: Faber L. Johnston.

(Testimony of Faber L. Johnston.)

Direct Examination

By Mr. Chargin:

Q. Where do you reside, Mr. Johnston?

A. 1220 Hedding Street, San Jose, California.

Q. And what is your occupation?

A. Attorney at Law.

Q. Did you know Mr. Adolph J. Koch during his lifetime?

A. I have known him for a great number of years; I couldn't say exactly, but over thirty years.

Q. You are an attorney at law?

A. Attorney at Law.

Q. Duly licensed to practice in this state?

A. Yes.

Q. And how long have you been practicing in San Jose? A. Since 1915.

Q. Did you ever have professional dealings with Mr. Koch?

A. Well, the first matter I handled for him personally, entirely, I believe was in 1917 or 1918.

Q. Yes. [70]

A. Around that time. Before that I was in the law office with my father, and my father's office was counsel for Mr. Koch.

Q. I see. Did you, during the latter part of his life, become his counsel?

A. I was counsel for Mr. Koch. In fact, we were quite friendly and he used to come in my office and consult with me practically with reference to every investment he made, or business transaction which he made.

(Testimony of Faber L. Johnston.)

Q. Over what period of time?

A. Over the last ten or fifteen years of his lifetime.

Q. The last ten or fifteen years of his lifetime. Are you the attorney, or were the attorney for the San Jose Building & Loan Association?

A. I am counsel for them now, and I was counsel for them from 1919 to 1935. And from 1935 to '37, about '37, I was no longer counsel for them, although I was on the Board of Directors. Since that time I have been counsel for them.

Q. Since that time you were counsel?

A. At the present time I am counsel.

Q. Well, being counsel for the Building & Loan, did you meet Mr. Koch in a business way?

A. Mr. Koch—I don't remember the date—but Mr. Koch was appointed a director of the Association. I was [71] counsel for the association prior to his being made a director. After he was a director of the association he was president of the company for quite a number of years; I was counsel for it during that time.

Q. And as counsel you had then business dealings with Mr. Koch?

A. Practically every day.

Q. Yes. Did you attend the meetings of the Board of Directors during the year 1938?

A. I did.

Q. And did you see Mr. Koch at any of these meetings?

A. My recollection at first was that I saw him

(Testimony of Faber L. Johnston.)

at every meeting; in checking the record I find that he was absent at two meetings.

Q. Absent two meetings for what period of time?

A. Well, I think it was two monthly meetings. They only had their meetings once a month, as a rule, unless there was something special.

Q. I mean, what year was this that you referred to? A. I think it was in 1938.

Q. '38. Do you know whether you ever saw him at a meeting of the association in 1939?

A. I don't remember or recall seeing him at a meeting of the Board of Directors, but I do know of seeing him at a meeting of the Securities or Finance Committee of the [72] company, several times in the directors' room, when I would call at the office he would be sitting in the back room talking with some of the officers of the company in connection with their loans.

Q. And that was in what year?

A. '39, I believe.

Q. '39. When did you see him previous to his death, the last time previous to his death?

A. Well, I saw him at least four or five days or a week prior to his death.

Q. Where did you see him?

A. At his home.

Q. At his what? A. At his home.

Q. At his home. Did you ever see him in your office previous to his death, and if so, about what time?

(Testimony of Faber L. Johnston.)

A. He called at my office at least once or twice.

Q. Yes.

A. Within—sometime in the first part of '39, I don't remember the date. I saw him at the Building & Loan Association a couple of times, and I used to talk with him there and then help—walk with him across the street to the First National Bank. Because my office was in the First National Bank Building and the Building & Loan Association Office is almost directly across the street. [73]

Q. And do you know how he would either come or go from the Building & Loan Association during 1938?

A. Well—in 1938?

Q. Yes, '38.

A. Well, sometimes he walked down.

Q. I see. Do you know—

A. Sometimes Mr. Cowell, the association employee, would go down and get him in the automobile of the association. He worked for the association.

Q. Where did Mr. Koch live?

A. He lived on South Third Street. I don't remember the number.

Q. And about how far is that in number of blocks from the Building & Loan Association?

A. About five blocks, I should judge. Four or five blocks.

Q. Four or five blocks. And in some cases you say he walked to and from the association?

A. Sometimes. He told me he walked down; I never saw him walk down.

(Testimony of Faber L. Johnston.)

Q. Did you know that he walked over to the First National Building from there?

A. He walked over because I walked over with him.

Q. Did you prepare any wills for Mr. Koch?

A. I prepared several wills for Mr. Koch. [74]

Q. Several of them. You heard Mr. Koch, George Koch, testify about the preparation of a spendthrift provision of the will. Do you recall the circumstances under which that was executed and made?

A. Well, in 1931, latter part of '31 or first part of '32, Mr. Koch came into my office, and he had been talking about his son George who had lost considerable in the failure of Gorman Kaiser Company, and he was going to transfer to him certain stocks and securities which he had. He asked me about it. As I remember—this is my recollection—it is my thought that he was going to transfer him a large number of shares of American T. & T. and some money. And I told him at that time that George Koch, because of the failure of Gorman Kaiser Company, and because of his being a partner in that company, had a contingent liability because of its debts, and that if he transferred any property to George, if they sued him on it, he would probably lose it. And I suggested that the only way he should do was to make a will in which he tied it up so that his creditors could not attach the property, and place it in trust.

Q. Then later on was that spendthrift provision cancelled?

(Testimony of Faber L. Johnston.)

A. In February, in 1932, such a will was prepared and drawn. I have the original will here in the court, but with the signatures torn off. I didn't know that I had it [75] until this morning. I picked up a file which had some old wills in it. And Mr. Koch cut off the signatures. And that was made in about February 23rd, 1932, in which the spendthrift trust was created of property for Mr. George Koch, and another trust was created for Mr. Ralph J. Swickard.

Q. Did you subsequently prepare some more wills for Mr. Koch?

A. I prepared two—three more wills, as I remember, and two codicils. I don't remember the dates, but there was one in '33; there was a codicil in April, '33, and there was one, I think, maybe in '34, and maybe in '35. The date of the will which was probated, I drew.

Q. Did Mr. Koch make any statements to you about transfers to his son during that period of time, during, say, around 1935, '34 or '33?

A. Well, Mr. Koch a lot of times talked to me about transferring property to George and transferring property to Ralph, the grandson. And he had told me that he had made certain transfers and Christmas presents—this is only what he told me.

Q. Yes.

A. He had given George and he gave his daughter in her lifetime certain gifts, Christmas gifts at the time. It is my recollection that at one time

(Testimony of Faber L. Johnston.)

he gave George Koch ten thousand dollars as a Christmas present, because he told [76] me and he showed me—it wasn't in cash, it was stock certificates which he had—and he showed me, he said "I am giving this to George for Christmas."

Q. Do you know what year that was, about?

A. No, but it was a long time prior to 1930.

Q. Yes. Do you recall preparing a trust agreement sometime in about 1938?

A. I drafted an agreement creating a trust for Ralph J. Swickard in 19—I think it was dated December 20, 1938. That is my recollection of it.

Q. December of 1938. And who was the trustor under that agreement?

A. Mr. Koch, George A. Koch. I can tell the facts under which that agreement was prepared, if you wish me to state directly how it was prepared.

Q. I was going to ask you that: Who was trustee under that? A. Mr. George Koch.

Q. The son?

A. You mean the beneficiary was Ralph J. Swickard?

Q. That's right. But George was the trustee and Adolph was the trustor, is that right?

A. Yes, and Adolph J. Koch was the trustor. [77]

Whereupon the document above referred to was marked Petitioner's and Respondent's Joint Exhibit A-1, and received into evidence.)

(Testimony of Faber L. Johnston.)

[Printer's Note: Petitioner's and Respondent's Joint Exhibit A-1 is set out at page 172 of this printed record.] [79]

By Mr. Chargin:

Q. I show you that document, Mr. Johnston, and ask you whether or not you prepared that document? A. I prepared this document.

Q. And at whose request did you prepare it?

A. On December 20, 1938, Mr. George Koch telephoned me at my office and told me that his father had transferred certain cash and securities to him for Ralph Swickard, and had transferred certain other securities to himself, and he asked me—he wanted something to protect him, something in writing to protect him as against the father of Ralph Swickard and the stepmother, who were objecting to his grandfather, A. J. Koch, furnishing Ralph money to go to Stanford University. And I suggested that perhaps we could draw up a simple trust agreement. So he told me to get a list of the securities from Mr. Hellwig, who would be able to furnish them; that he would give Mr. Hellwig a list of those securities. I phoned Mr. Hellwig and got the list. I went down and talked to Mr. Koch personally to find out what the matter was and to see what sort of provision. So he suggested that we put it along the lines of tying it up in George's hands until Ralph should be thirty-five years of age—the way I remember it—I have forgotten this—(referring to document). Yes, that

(Testimony of Faber L. Johnston.)

is correct, according to the trust agreement. And if anything should happen to [80] Ralph, it should go to George himself, outright; and if anything should happen to George it should go to George's son, Kenneth Koch. So I then prepared a document, this document, as a tentative form and mailed two copies of it by letter to Mr. George Koch at the Hotel Whitecomb in San Francisco. I didn't see the agreement until sometime afterwards, when it was signed by both parties. In my letter I suggested that it should be signed by both him and his father, as he was the beneficiary under the trust.

Q. I see. Mr. Koch, the trustee, was also a contingent beneficiary?

A. Beneficiary, named in that, under the trust.

Q. Do you recall that in the meeting of the directors of the Building & Loan Association sometime during the latter part of 1938 a discussion had with the directors and Mr. Koch concerning a loan, a large loan, with the Paramount Hotel Company?

A. The Paramount Hotel Company owned the association over half a million dollars at one time—I don't remember the exact balance at the time of that discussion—and they were asking to pay off the loan without penalty. And for a long time the association would not accept the money without charging it two percent payoff. The discussion involved the business principle involved. And Mr. Koch talked to the directors and suggested that in a matter of the amount of [81] the loan of that

(Testimony of Faber L. Johnston.)

size, it was better to take the money and use it without penalty, because smaller loans were much more advantageous to a loaning company than one large loan. And as I recollect it, Mr. Koch proposed a resolution to the Board of Directors that the company accept the payoff, and the matter was carried unanimously, as I remember it.

Q. Was that done in your presence?

A. It was done in my presence. I was a member of the Board at that time, as I remember it.

Q. And do you recall what time of the year in '38 that took place?

A. The records will show. I don't know. It was sometime in 1938. I think it was sometime in the early part of the year, around March, but it might have been later, I can't say.

Q. You stated, I believe, that shortly before the death of Mr. Koch you were down to see him at his home, is that correct?

A. That is correct.

Q. How long before his death, do you know?

A. Well, I used to go by there—My sister-in-law lived on the same street, about three blocks beyond there, and my wife used to go over to see her mother, at this time who had been sick, and I used to go over and get my wife, and I would go by there maybe three or four or five times a [82] week, and if Mr. Koch would be sitting out on the porch or in the window I would stop in and talk with him.

(Testimony of Faber L. Johnston.)

Q. When you would drop in to see him, what did you observe with regard to his physical condition?

A. His physical condition was fine, in this way: He was complaining about his leg, in fact, ever after he was hit by an automobile at one time, he complained about his leg, and he said all this trouble had been from that. Notice now, I have been told, I never saw it, that he had an indentation in his back where the machine struck him. Well, he limped and walked around with a cane; right after the accident for awhile he would use a crutch, and then he would throw it away. And he was a very energetic man, and he didn't like to have any handicap. But most of the time when I saw him, he was sitting on the porch of his house or in the front room looking out the window.

Q. Did you at any time ever see him bedridden, to your knowledge?

A. I don't remember ever seeing him. I have been at his home when he was in bed at night, yes, called by there at night a couple of times. One time when George was there I dropped in to see George, and his father had gone to bed, but he was a man that got up about five o'clock in the morning and shaved, and he went to bed early.

Q. And what was his attitude with regard to being [83] cheerful, or the contrary, what was his conduct, demeanor?

A. Well, he was a versatile gentleman, and he

(Testimony of Faber L. Johnston.)

had a lot of pet sayings, and he talked business. He was always in good spirits. I never saw him down in spirit in my life.

Q. And you would say that condition existed to just previous to his death, so far as you know, in your visits with him?

A. Why, always that way, as far as I know.

Q. And do you recall the last visit up to the time of his death, how close the last visit that you saw him?

A. I can't remember, but I think it was within the last two or three days.

Q. Within the last two or three days. Did Mr. Koch ever tell you about his intention to make any gift to George, or discuss it with you in your office?

A. He discussed it with me in my office.

Q. Yes.

A. He came into my office one day and he said——

Q. Give the date, the approximate time, do you know the year?

A. Well, I think it was sometime in—I know it was in 1938.

Q. Thirty-eight.

A. He came into my office, and he said that Ralph Swickard's father refused to send the boy to college, that [84] he said he couldn't afford it. He said he was going to send him to college and that Mr. Swickard objected to it; and that he was going to send Ralph to college and that he gave him

(Testimony of Faber L. Johnston.)

\$500.00 to start him out at the start, \$500.00 to start there, and the boy spent the money too fast. Now, I could go on and explain the rest of what he told me later on. Because before I put that in the trust agreement he told me that Mr. Swickard, the boy's father, and the stepmother, were objecting to the boy having any property, or objecting to him giving any money to the boy, and that they wouldn't allow him to live at home; they made him go out in the back yard and live. And that he was going to fix it so the boy would be absolutely independent and that his father or his stepmother would have nothing to do with the boy's business. And that is why he was transferring this property to the boy so he would be absolutely independent of his stepmother and father.

Q. Were there any discussions at that time about giving money to George, the son?

A. He gave George a like amount. Because he said "If I am giving this"—He talked to me prior several times about transferring property to George, which was of a greater amount than the amount which he actually transferred.

Q. What amount did he discuss he was going to give that was larger than that seventy-nine thousand? [85]

A. Well, at one time he was going to give him one hundred thousand dollars in securities.

Q. When did he say that, if you know?

A. Well, I think if I remember right it was in 1932, prior to the first spendthrift will.

(Testimony of Faber L. Johnston.)

Q. And do you know why he didn't give it to him? A. Because I advised him not to.

Q. I see. Did you put George through bankruptcy in '35?

A. I had nothing to do with the case.

Q. I see. Do you know whether Mr. Koch owned an automobile in 1938?

A. Yes, because in 1938 the Motor Vehicle Department, the head of the Motor Vehicle Department called me and told me that Mr. Koch had come in for an automobile license, to renew his automobile driver's license, and that his eyesight was such that he couldn't read the letters and asked me about it. I told him that the old gentleman was using a pair of store glasses that he had had for years, and if he had his eyes examined that he could see all right, so I suggested that he go and have his eyes examined, which he did, and had a new pair of glasses made. He passed the examination and the Department issued him a driver's license.

Q. And was that in the year 1938?

A. If I remember right it was in April, 1938.

[86]

Q. I see. And at that time he owned an automobile. And did you ever see him operating one?

A. Yes, he drove it. He came out to my house to dinner one night and he drove out.

Q. Did you have a discussion with Mr. Koch concerning a transfer of real property by the will of Mary E. Doar, or Martha E. Doar, rather?

(Testimony of Faber L. Johnston.)

A. I talked with Mr. Koch about that for the reason that the will of Martha Doar, as I remember it, at one time provided that that property was to go to Ralph and to George Koch, and when George Koch became involved in the Gorman-Kaiser matter the property was put in A. J. Koch's name for them so that it wouldn't appear of record in George's name and be subject to creditors' claims. And as I remember it, the will was changed so that the property was left to A. J. Koch, and subsequently that property was transferred by deeds [87] from A. J. Koch to George Koch and Ralph Swickard. The deeds were placed in escrow in my hands with written instructions to hold until he died. Long prior to his death, I don't remember the exact date, but I think that I have the written memorandum in my files somewhere, he instructed me to deliver the deeds then, in his lifetime, which I did.

Q. And what property did that affect, do you recall?

A. It affects the property on Third Street, as I remember.

Q. Third Street?

A. And I don't remember whether it affected other property or not. But there was a piece of property right near where he lived, which I remember was transferred.

Q. All right. [88]

DR. EMIL LESTER COTTRELL

was called as a witness for and on behalf of the Respondent and having been first duly sworn was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Emil Lester Cottrell. [89]

Direct Examination

By Mr. Murray:

Q. Dr. Cottrell, the reporter has your name, I presume, and address?

The Reporter: I haven't the address.

A. San Jose, California.

By Mr. Murray:

Q. Dr. Cottrell, how long have you been a medical doctor? A. I graduated in 1903.

Q. From what school, please?

A. Jefferson Medical College.

Mr. Chargin: We stipulate to his qualifications to save time.

Mr. Murray: I wanted to get his background in the record, is all.

By Mr. Murray:

Q. And how long have you been a practicing physician in San Jose?

A. I entered the practice in 1924.

Q. And do you have—— A. In San Jose.

Q. In San Jose. And you have practiced here ever since? A. I have. [90]

Q. Now, in the course of your profession did

(Testimony of Dr. Emil Lester Cottrell.)

you attend Mr. Adolph Koch, the decedent in this case? A. I did.

Q. And have you brought records of your office with respect to such professional attention?

A. I have.

Q. Will you state the first time you were called to attend Mr. Koch?

A. I was called to see Mr. Koch on May 18th, 1938.

Q. And who called you in to see him?

A. I do not know; it came over the telephone.

Q. I see. You were called to his home?

A. I was.

Q. And when you first saw him where was he?

A. He was in bed.

Q. And you examined him immediately?

A. I did.

Q. And what was your diagnosis of his situation at that time?

A. That he had had a paralytic stroke.

Q. Did you determine just when, at what time before your call he had had this paralytic stroke?

A. Not exactly in minutes and hours.

Q. But sometime soon?

A. Sometime recently before 5:15 P. M. on that date. [91]

Q. Now, who else did you find at the house—I might ask, was there anyone attending him at the time or taking care of him?

A. I think there was an untrained nurse.

(Testimony of Dr. Emil Lester Cottrell.)

Q. Do you recall her name? A. I do not.

Q. Well, if I suggested "Mrs. Compton" would that sound like it? A. That is the lady.

Q. Did you have a conversation with her about his condition just before you came in? Did you ask her—I will withdraw that question. Did you ask her what had transpired with respect to him before you came in on that day of May 18th?

A. You mean before I met Mr. Koch, himself?

Q. Yes.

A. I think when I entered the house I asked her what had happened.

Q. And do you recall what she said?

A. I think she said that he had a fall.

Q. Did she say where he had fallen?

A. If I remember correctly, he fell near the bed.

Q. Yes. Now, what did you—I will withdraw that question. Now, when was the next time you called on Mr. Koch, Dr. Cottrell? [92]

A. I called on him May 21st, 1938.

Q. That was a few days later than the first call?

A. Yes.

Q. And in what condition did you find him at that time?

A. Well, I found him bedridden, and he was unable to use his left hand and left lower extremity.

Q. And then did you call on him quite often after that for a period? A. I did.

Q. Would you state how many other calls you

(Testimony of Dr. Emil Lester Cottrell.)

made and the dates, immediately following that second call?

A. I called on him May 22nd, 1938; May 23rd, 1938; May 24th, '38; May 25th, '38; May 26th, '38; May 27th, '38; May 28th, '38; May 30th, '38; May 31st, '38; June 1st, '38; June 2nd, 3rd, 4th, 5th, '38; June 6th, 7th, 8th, 9th and 10th, '38; June the 12th, 13th, 14th, 16th, 17th, 18th and 19th, '38; June 20th 1938; June 22nd, 1938.

Q. And your last call in that series, at least, was on June 22nd, 1938? A. Right.

Q. And what was the condition of Mr. Koch at the time of your last call?

A. There was much improvement in his left leg and he was able to stand by the bed, with the use of crutches for support. [93]

Q. Now, did you see Mr. Koch either professionally or otherwise in—no, I will withdraw that question. Did you attend Mr. Koch any more during the year 1938, after June 22nd?

A. I made one other call to see him, but that was not regarding this case, this particular condition. He had an inflamed eye. I called on him December 26th, 1938.

Q. And you called on him particularly in connection with an inflamed eye? A. I did.

Q. And did you notice at that time what the condition of his left leg and arm was, with respect to usability?

A. No, I did not ask him to demonstrate because he didn't call me for that.

(Testimony of Dr. Emil Lester Cottrell.)

Q. I see. Now, did you see Mr. Koch, even though not professionally, in between those last two calls, in between June 22nd and December 26th, 1938? A. I saw him once, socially.

Q. Would you state where you saw him socially?

A. I met him at the Masonic Temple.

Q. And will you state when that was, if you can remember? A. On December 25th, 1938.

Q. And what was the occasion, if you don't mind telling? [94]

A. It was the Knight Templar breakfast given at the Masonic Temple in San Jose.

Q. And Mr. Koch was there? A. He was.

Q. Do you know how he got there?

A. No, I do not know how he got there, but he was in a wheelchair.

Q. He was in a wheelchair at the banquet or at the breakfast? A. He was; he was.

Q. And he was attended or not at the time?

A. His nurse was with him.

Q. I see. A. Mrs. Compton.

Q. Was there any other doctor or doctors in attendance with you during that first period from May to June, 1938? A. There was not.

Q. You never consulted with any other doctors in connection with it?

A. I did not. I think I offered him the privilege of having a doctor, but he didn't care to have another doctor come in.

Q. Was the fall, which I understand Mrs.

(Testimony of Dr. Emil Lester Cottrell.)

Compton told you Mr. Koch had had before you came, was it from that [95] that you determined that he had a stroke? Was it just from the knowledge that he had a fall? A. Partly.

Q. Well, what other symptoms did he have; I mean, on what else did you base your diagnosis that he had had a stroke at that time?

A. The fact that he could not use his left leg and his left arm and hand.

Q. Well, are those signs, in your opinion, pretty definite indications of a stroke? A. They are.

Q. Dr. Cottrell, did you have any knowledge of your own with respect to an automobile accident which others have testified Mr. Koch had suffered some years prior to 1938? A. I did not.

Q. Did you notice any scars or evidences of some such an accident, when you examined him?

A. I did not.

Q. Well, if Mr. Koch had a hole in his back you could put your fist in, would you not have been apt to have seen it? A. I think I would.

Q. And you didn't see such a thing?

A. I did not.

Mr. Murray: That is all, Doctor. [96]

Cross Examination

By Mr. Chargin:

Q. Dr. Cottrell, what treatment did you prescribe for Mr. Koch the day you came there, if any?

(Testimony of Dr. Emil Lester Cottrell.)

A. I advocated that he be kept in bed and be kept on a light diet; and I inquired about his intestinal tract, his bowels; whether he had passed his urine or not, and so forth.

Q. Do you know whether Mrs. Compton was a nurse, or domestic, housekeeper?

A. I understand that she was an untrained nurse.

Q. You don't know that of your own knowledge?

A. I do not.

Q. Mrs. Compton told you about a fall that he had, when you first entered? A. She did.

Q. I see. When did you take Mr. Koch's blood pressure for the first time?

A. On May 21st, 1938.

Q. That was two or three days later, is that right? A. That's right.

Q. And what was his blood pressure reading on that date?

A. Systolic pressure 145, and diastolic was 75.

Q. And his temperature at that time was practically normal? [97]

A. Practically normal; 98.2 degrees Fahrenheit.

Q. Did Mr. Koch ever say anything or report to you about his left hip or left leg, did he tell you anything about his left hip and left leg?

A. No.

Q. He did not?

A. You mean regarding the accident which he had before?

(Testimony of Dr. Emil Lester Cottrell.)

Q. No, just about any condition about his left leg or left hip?

A. No, he didn't discuss that with me.

Q. He didn't discuss that? A. No.

Q. Did you examine his back at that time?

A. I did not.

Q. You did not? A. I did not.

Q. So then as long as you didn't examine his back, you don't know whether there was a hole there or not, do you? A. No, I don't.

Q. You knew nothing about this previous accident? A. No, I did not.

Q. Did you prescribe later on—Did he have a cold or something of that kind during that period?

[98]

A. He did.

Q. You prescribed some medicine for a cough or a cold?

A. I think I did. I haven't a record of it, I think, at this time. Yes, I have a record. On May 23rd.

Q. Yes. A. I prescribed medicine.

Q. And the cough went away on the following day, or probably he discontinued the cough medicine the next day?

A. He didn't care to take medicine, so I told him he could discontinue.

Q. What was the condition of his urine on the 24th and 25th, was it normal at that time?

A. On the 24th the urine was normal.

Q. And on the 26th, his appetite was good?

(Testimony of Dr. Emil Lester Cottrell.)

A. Yes.

Q. And how were his bowels at that time?

A. Free.

Q. I see. And was his blood pressure about the same the next time you took it?

A. On May 28th the blood pressure was 140 systolic; 70 diastolic.

Q. I see. A. Practically the same.

Q. Yes. Did his nurse ever ask you subsequent to [99] that time, Mrs. Compton, the housekeeper, as to the number of visits that were necessary, or whether you had to come there anymore?

A. I think she talked with me about that and told me that Mr. Koch, George Koch, was unable to get definite information over the telephone, and he wanted me to call every day and see the patient so that she would be in a position to tell him definitely how Mr. Koch was getting along. That is why the calls were made every day instead of every two or three days.

Q. At Mr. George's request, to see that his father was taken care of properly? A. Yes.

Q. And when you discontinued your services there on the 22nd of June, was Mr. Koch then restored to normal condition? A. Oh no.

Q. You don't believe so? A. No.

Q. Well, what was his condition when you discharged him?

A. Well, he was much improved, and as I stated here, he stood by the bedside with the use of his

(Testimony of Dr. Emil Lester Cottrell.)

crutches. He was not able to walk at that time, but he might have been able to walk with the assistance of the nurse. [100]

Q. Well, would it be possible within a short time thereafter to recover from that condition?

A. Well, that would be a pretty slow process.

Q. Yes.

A. Judging from what had taken place previously.

Q. Did you subsequently see him around with either a crutch or a cane?

A. I think the next time I saw him was the—no, I saw him on December 25th, that was the next time.

Q. And on December 25th when you say he was at the Masonic Temple, do you know whether or not he made a talk or a speech that day to the group?

A. I do not remember; I do not remember.

Q. Do you know that he was in charge of that breakfast that day? A. I did not know that.

Q. You didn't know that? A. No.

Q. Do you know if it was customary for him to be in charge of those breakfasts, of that group?

A. I did.

Q. You don't recall whether Mr. Koch made a speech or a talk to the audience or group that day of that breakfast?

A. I remember that he was called on, but I don't [101] remember that he made any speech.

(Testimony of Dr. Emil Lester Cottrell.)

The only speech that I remember of, he sent word by the nurse for me to come over and see him.

Q. When you left he asked you to fill out the check for your services. Did he sign the check?

A. He did.

Q. Did you test the reflexes of Mr. Koch at the time you first diagnosed his case? A. I did.

Q. What was the condition of his reflexes on the opposite side of the head where he was supposed—

A. Well, his pupils were equal and reacted equally to light.

Q. How about the other side, the other arm and leg?

A. I didn't test the arm. I tested the right knee.

Q. And what was the effect?

A. That was all right.

Q. Was it increased any?

A. I think it was just the same. It was normal. Just normal.

Q. Well, isn't it possible, Doctor, if there is a stroke in one side of the body, of that kind, it is possible that the reflexes on the other side would be aggravated or increased, generally?

A. It might be either way. [102]

Q. It might be either way? A. Uh-huh.

Q. Isn't it generally customary that the reflexes on the opposite side are generally increased?

A. Well, I think maybe increased.

(Testimony of Dr. Emil Lester Cottrell.)

Q. Increased?

A. Yes. Because there is an irritation to the brain surface, the brain tissue.

Q. But they were not increased, they were about the same?

A. I think they were about the same, yes. [103]

LOUIS DOERR

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Chargin:

Q. Your name is Louis Doerr? A. Yes.

Q. And where do you reside, Mr. Doerr?

A. 282 South Eighth Street, San Jose.

Q. 282 South Eighth, in this city?

A. Yes.

Q. Did you formerly live near Mr. Koch?

A. Yes, just back of him. [104]

Q. What address was that?

A. 266 South Second.

Q. And your property abutted his on the rear, is that correct? A. Yes.

Q. How long did you know Mr. Koch, Adolph Koch?

A. Well, as long as I can remember; many, many years.

(Testimony of Louis Doerr.)

Q. I see. Did you see him around the yard during the year 1938 and '39?

A. Well, I am sure I saw him in 1939; I am not so sure about—I mean 1938. I am not so sure about 1938. Although I—yes, I did see him around his own yard. Not around our yard.

Q. Yes, his own yard. And was he able to walk around? A. Yes, he walked O. K.

Q. Did he have a cane or not, as you recollect?

A. No, I think not, at the time.

Q. I see. Did you ever discuss any business matters or neighborly subjects when you met him there in the yard?

A. Mr. Koch always had an idea that that property could be sold, that is, our property and his together on Third Street, could be sold as a whole, and he was contin- [105] ually after us to cut the trees down on Second Street, because he thought that would interfere with the sale of the property.

Q. When did he tell you or talk about these trees?

A. Oh, almost up to the day that he passed away.

Q. Did you consider him a pretty fair and a shrewd business man? A. Yes, I'll say.

Q. And did he ever have any discussions with you about selling the property jointly, your property and his property?

A. Well, as I told you before, our property

(Testimony of Louis Doerr.)

abutted his on the rear; in other words, his property is on Third Street just back of our property on Second Street. In other words, it would make one piece of property clear through from Second to Third Street, if it could be sold that way.

Q. This property would be suitable for business purposes, is that right?

A. I just didn't get that.

Q. This property would be suitable for business property? A. Yes, surely.

Q. How far are you from the main street of town, or this property, at that time? [106]

A. Well, I don't know what you would call the main part of town. If we judge First and San Fernando Street as the key part of San Jose, we were only two blocks from there.

Q. Well, First Street is the main street of town? A. Yes.

Q. And your property is only one block away from it? A. On Second Street, yes.

Q. When you saw him around the yard, what was his condition of health, so far as you were able to observe?

A. Why, he seemed perfectly all right, so far as I could judge.

Q. How was his disposition?

A. Well, he was always of a very cheery disposition.

Q. He was. [107]

FRED DOERR

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: What is your name?

The Witness: Fred Doerr, D-o-e-r-r.

Direct Examination

By Mr. Chargin:

Q. Your name is Fred Doerr?

A. That's right.

Q. And where do you live at the present time?

A. 465 South 16th Street, San Jose.

Q. And how long have you been residing in this community? A. All my life.

Q. I see. And you have the last ten or fifteen years been on the City Council of this city?

A. For eighteen years. [108]

Q. For eighteen years. And did you know Mr. Adolph Koch during his lifetime?

A. I certainly did.

Q. And where did you live with respect to his home, a portion of that time?

A. Well, part of the time I lived at 266 South Second Street; part of the time at 499 South Fifth; another time in an apartment at 480 South Third, until I built my present home.

Q. And all those addresses are very close to the dwelling house of Mr. Koch?

A. All except the last one.

(Testimony of Fred Doerr.)

Q. I see. And how long did you know Mr. Koch?

A. Well, he attended my first birthday; in fact, when I was born he was invited to my home, my folks' home.

Q. He knew you all your life?

A. So he knew me from the time I was born, practically.

Q. Was he also a member of the same lodges, organizations you were? A. He was.

Q. And what was that?

A. San Jose Commandery.

Q. Knights Templars.

A. Knights Templars. [109]

Q. Did you ever visit in his home during the time you were living near him?

A. Oh, yes, quite frequently.

Q. How often would you visit him, say, during the year '38?

A. Well, maybe once a week; maybe not so often. I don't know, I never kept a record of the time.

Q. What did you observe as to his physical condition in 1938? A. Seemed to me to be O. K.

Q. Was he up and around?

A. Well, he was confined for a few weeks there.

Q. Yes.

A. I don't recall the nature of the confinement, but he was in his home there for several weeks during that time.

(Testimony of Fred Doerr.)

Q. During the latter part of the year was he up and around? A. '38?

Q. Yes, sir.

A. I believe he was. I think I saw him at a Knight Templar doings on December 25th, '38.

Q. That was Christmas Day?

A. Christmas Day; Christmas morning.

Q. Do you know whether he had charge of that [110] breakfast? A. He did; he did.

Q. And what was his duty in charge of that breakfast?

A. Well, he provided the refreshments; he ordered all of the supplies that were necessary and had entire charge, and called on the ladies of the Commandery members to wait on the tables. He was there first thing in the morning and had entire charge of the program.

Q. He was very interested in the affairs of that society, and particularly that Christmas function, is that right?

A. Yes. He had charge of the Christmas breakfast for quite some years—I don't remember how many years prior to that time.

Q. Did he ever discuss with you his personal business affairs, concerning his son or grandson?

A. Well, the only thing that he ever mentioned to me was the fact that he wanted to do something for Ralph, his grandson; he wanted to see that he had a decent education, and he was going to do

(Testimony of Fred Doerr.)

something handsome for him so that he could procure this education that he thought was necessary.

Q. Do you know when he happened to say that, what year it was?

A. Well, I think it was during '38, somewhere along [111] there; maybe early in '39. I am not sure as to date.

Q. Did the grandson ever come over to the house, ever see him over there, the grandson, Ralph?

A. Well, he lived with them for quite a number of years, up until he was about eighteen years of age, I believe, or pretty close to that.

Q. I see.

A. In fact, they raised him from the time he was a shaver; his mother died from childbirth.

Q. Did Mr. Koch ever tell you that he made some gifts or transfers to his son and to his grandson, that you recall?

A. No, I think not; although I do kind of have it in my mind that he mentioned something about having given George something the time he was in Gorman-Kaiser. I think he did. I'm not positive as to that, as to any amounts or anything of that sort. It never entered his mind, nor mine.

Q. Did you ever have any discussions with him concerning his future prospect of living, and what he thought about how long he was going to live?

A. Never did.

Q. Never said anything about that?

(Testimony of Fred Doerr.)

A. I guess he thought he would live forever, I don't know.

Q. Well, he was a pretty sturdy gentleman, wasn't he? [112]

A. He certainly was.

Q. Do you know whether he drove his automobile during the year '38?

A. I knew he had one; I have never seen him in it. I don't know.

Q. You knew he had one?

A. I never had occasion to be in the neighborhood when he was— (Pause).

Q. Did he ever discuss with you the matter of transferring some stock, your stock, in the Masonic organization for the purpose of—

A. Well, he did mention it, he said I ought to turn it over because they wanted to make it as a tax-exempt corporation; it was a fraternal organization where they paid no dividends.

Q. In other words, he wanted the members to turn in their stock?

A. Turn in the stock.

Q. So the Masonic Order could have a tax exemption on the franchise tax?

A. Yes.

Q. And do you know how soon previous that he discussed that?

A. Oh, that was early '39; during '39 sometime.

Q. Early '39. Was he able to get up during '39, [113] did you see him around?

A. Well, he was always around his room and in the house.

(Testimony of Fred Doerr.)

Q. And did you ever see him outside?

A. I don't recall of being there at any time when he was outside. Because when I would call, I would just happen to go by and he would be sitting in the window. I would go in and say hello to him.

Q. Did you ever see him uptown during '39, that you recall? A. I wouldn't be sure of that.

MAMIE E. DOERR

was called as a witness for and on behalf of Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: And what is your name, please?

[114]

The Witness: Mamie E. Doerr.

Direct Examination

By Mr. Chargin:

Q. Your name is Mamie Doerr, and you are the wife of Mr. Doerr who just testified? A. I am.

Q. And how long did you know Mr. Koch during his lifetime, Adolph Koch?

A. Well, I couldn't say; several years.

Q. Several years. Did you ever visit over at his house? A. Yes, quite often.

Q. And during the year '37, '38, that you recall?

(Testimony of Mamie E. Doerr.)

A. Yes. I don't know about '37, but it was along during his sickness I was over there.

Q. And did you visit him in '39, after his illness, and when he recovered?

A. Yes, I was there.

Q. Was he up and around?

A. He was sitting in the front room, in the bay window.

Q. Did he ever discuss with you transfers and transactions, or the welfare of his grandson?

A. Yes; he did, quite a bit.

Q. What did he say about his grandson? [115]

A. Well, he said he wanted to see Ralph was provided for for an education. And he said that he had been left an orphan, that is, he felt he was an orphan. His father had married again and he wanted to see that he was taken care of.

Q. Did he say anything about whether or not he got along with his stepmother, was there any discussion about that?

A. No, no, he didn't say anything to me about that.

Q. Were you present that morning of the Christmas breakfast in 1938 when Mr. Koch was in charge of the affair?

A. Yes, I was.

Q. Was he in charge of that affair?

A. Yes, he was.

Q. And do you know what arrangements he made for it?

(Testimony of Mamie E. Doerr.)

A. Well, he provided everything. And he wanted—always wanted me to take charge under him. So, I was pretty well acquainted with him that way. That is how I became acquainted with Mr. Koch.

Q. Do you know whether he went down to make preparations before the day of the ceremony?

A. No, I don't. I know he was very particular about his slices of ham; every one had to be just so.

Q. Do you know whether he made a little talk or was called on to speak or to say a few words that morning? [116]

A. I think he did. I am not positive about that.
[117]

DR. ARTHUR T. MCGINTY

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: Your full name?

The Witness: Arthur T. McGinty.

Mr. Chargin: I will take him as my witness.

Mr. Murray: All right.

Mr. Chargin: I will put him on.

The Judge: Called as a witness for the petitioner, and the record may so show. Very well.

(Testimony of Dr. Arthur T. McGinty.)

Direct Examination

By Mr. Chargin:

Q. Dr. McGinty, how long have you been practicing medicine and surgery in this community?

A. Since 1907.

Q. 1907. And where did you receive your education? A. University of California. [118]

Q. University of California. And did you know Mr. Koch during his lifetime?

A. Knew him very well for many years.

Q. And where did you reside with respect to his house? A. Next door to him.

Q. And for how many years did you reside next door to him?

A. From 1923 up to the time of his death.

Q. Did you visit him often or talk to him in the yard, or next door, as neighbors?

A. Very often. We visited, we were close friends.

Q. Very close friends?

A. Neighborly friends. My children and his children were very close friends and visited back and forth.

Q. What was the condition of his health in '37 and '38, so far as you know? A. Very good.

Q. Very good. Was he up and around?

A. Oh my yes.

Q. And did you ever see him drive his automobile in 1938?

(Testimony of Dr. Arthur T. McGinty.)

A. I believe I did, but I really couldn't answer that very positively. I know that for some little time before he died that he didn't drive it. [119]

Q. He didn't?

A. I think one reason probably was that he wanted Ralph to have it.

Q. Did you treat him— Were you called to treat him upon or about the 28th or 29th day of June, 1939?

A. Yes, I was called a little while before that.

Q. You were?

A. And then I saw him and doctored him after his automobile injury, when he got that bump.

Q. I see. A. On the right side.

Q. Well, to go back to the time just previous to his death, were you called at the time of his last illness? A. Yes.

Q. And where, who called you and where, do you know? A. Mrs. Compton called me.

Q. Mrs. Compton. And where did you go, to his home or to the hospital? A. To his home.

Q. And what did you find and what did you observe at that time?

A. Well, he was in a state of shock.

Q. And did you discuss with the domestic there, the housekeeper, what happened or what was the matter? [120] A. Why certainly.

Q. What did she say?

A. Something hit him suddenly and he fell.

(Testimony of Dr. Arthur T. McGinty.)

Q. He fell?

A. In the bathroom, I think it was, as I remember.

Q. And what was his chief complaint then?

A. He had a distress, a very severe lower abdominal distress, which gradually developed and increased, and he thought that he couldn't urinate.

Q. Yes. Did you diagnose at that time as a rupture of the left hypogastric artery?

A. No, I couldn't make any diagnosis at that time.

Q. But I mean, what was your diagnosis or what did you think he was suffering from just at the time that you were immediately called in?

A. I first thought he—his prostate had blocked up and that he had a distended bladder. And I attempted to empty it, and I couldn't get any urine at all. Then the next thought I had, the possibility of an abdominal—either an abdominal hemorrhage or a partial paralysis of the bowels. There are so many little things that can develop suddenly in a case like that, that it is sometimes impossible to make a diagnosis.

Q. Did you see Mr. Koch during the early part of 1939, around the house, or out in the yard, that you recall? [121]

A. Oh yes.

Q. And how did he look then?

A. I saw him every day, nearly.

(Testimony of Dr. Arthur T. McGinty.)

Q. How did he look then and what was the condition of his health?

A. Looked wonderfully well. His limp that he had after Dr. Cottrell took care of him had cleared up almost entirely.

Q. Did he use a cane or how did he get around?

A. He didn't use a cane very much, as I remember.

Q. Didn't use a cane.

A. There was for a time when he would go out riding, he would have to have a cane and have someone help him in the car. I can remember, myself, that I have offered to help him down the stairs and help him get in the car; he absolutely refused to have any help. He was very independent.

Q. He was very independent about himself, is that right?

A. About any assistance of any kind. He always was.

Q. And did he ever say anything to you or remark to you, or make some statement to you concerning that hip of his, or that sore leg?

A. The right side? [122]

Q. Yes.

A. Oh yes. I doctored him at that time, and I drew out— He had a hemorrhage inside. Let's see, I forget now. I think it was—

Q. His left?

A. A little lower down, over the hip. I drew

(Testimony of Dr. Arthur T. McGinty.)

out—I wouldn't be surprised if it was the best part of a quart of fluid out of him two or three different times.

Q. That is when?

A. It was sometime after; it took it some time to develop and liquefy.

Q. And do you know what year that was in, approximately, Doctor?

A. Well, several years before his death.

Q. Would that hip leave him some permanent disability in the future, or did it?

A. Ordinarily it should not, but he always complained of having a rheumatism pain there.

Q. Rheumatism?

A. And he had an electric ring that he used to sit down and put around him, and said it soothed him and helped him.

Q. I show you, Doctor, a certified copy of—what purports to be a certified copy of the death certificate of Mr. Koch. Will you take a look at that. That is apparently [123] signed by you (showing). Do you recall preparing that, Doctor?

A. Yes, I do.

Q. And some of the information was obtained through whom, George Koch, George A. Koch?

A. Which information?

Q. Who was the informant on that?

A. What do you mean, on this side?

Q. Yes.

A. Well, the doctor never has anything to do

(Testimony of Dr. Arthur T. McGinty.)

with that, the preparation of that. Many times he doesn't even look at it.

Q. All right.

Mr. Chargin: We would like to have it introduced in evidence.

Mr. Murray: No objection. It is a certified copy.

The Judge: Very well, it may be handed to the clerk and marked Petitioner's Exhibit No. 2 and received in evidence.

(Whereupon the death certificate above referred to was received in evidence and marked Petitioner's Exhibit No. 2)

By Mr. Chargin:

Q. Now, Doctor, in this death certificate I notice [124] you state that the principal cause of death and related causes of importance in order of onset were as follows: Extra peritoneal hemorrhage due to rupture of left hypogastric artery. Now, Doctor, would you explain the meaning of that?

A. That artery is down under the Rectus muscle, and that was on the right side, and it goes right down in close to the bladder.

Q. I see.

A. And there is where the hemorrhage was, and that is the reason that it assimilated a bladder pressure.

Q. Could that rupture of that gastric artery have been occasioned by a fall, if he had fallen previous to that time? A. It could be.

(Testimony of Dr. Arthur T. McGinty.)

Q. Or would it be aggravated by a fall?

A. It could have been entirely; those things usually come as a result of a fall.

Q. I see. And now then, will you read the other causes of death in order of importance, and explain that?

The Witness (To the Judge): He couldn't get the word "interstitial."

By Mr. Chargin:

Q. I will let you read.

A. Chronic interstitial nephritis, with cystic [125] degeneration of right kidney.

Q. All right, what is the explanation of that statement, Doctor?

A. Well, he had some albumen in his urine which indicated a chronic—more or less of a chronic condition of the kidney.

Q. I see.

A. And some cystic degeneration in the left kidney. Small cysts which formed in the kidney. I must say that he never at any time showed any such condition or complaint, complained of anything, but it was there just the same.

Q. Previous to that time, as far as you know?

A. Yes. It may have been there and he may have been immunized to it for a long period.

Q. As a neighbor, Doctor, how did you consider his disposition, how was he with regard to his present and future affairs, in the concerns of life?

(Testimony of Dr. Arthur T. McGinty.)

A. Wonderful neighbor, always cheerful and happy.

Q. I see.

A. I never knew him otherwise.

Q. Did he ever discuss with you any thought of dying or anything of that kind?

A. Never have I ever heard or did I ever hear anything about death; he was always a very happy man, and had a happy outlook on life. [126]

Q. Yes. And you would consider him a rather strong man physically, is that correct?

A. Yes.

Q. To have lived that long?

A. He was always considered that by everyone.

Q. I see.

Mr. Chargin: No further questions.

Cross Examination

By Mr. Murray:

Q. Now, Doctor, can you recall which side Mr. Koch was injured on by the automobile accident?

A. On the right side.

Q. On his right side. And was that the side on which he sustained this hemorrhage or something, just before he died?

A. No—yes, it was the same side, yes.

Q. Now, did you have an opinion as to what the particular cause of that hemorrhage was at the time?

A. You mean the one that caused—probably had something to do with his death?

(Testimony of Dr. Arthur T. McGinty.)

Q. Yes. A. Yes, I believe it was the fall.

Q. You believe it was the fall?

A. He always complained of that right side after that injury, and there must have been some little muscle [127] weakness there.

Q. But——

A. And when he made a quick turn or what—of course I couldn't answer that—but I believe that the fall had something to do with it. There was no particular reason why it should rupture in that particular location.

Q. Well, at the time you attended him there just prior to his death did you make up your own mind at that time as to whether or not he had previously had a stroke?

A. I believe that he had a slight stroke originally, yes.

Q. And did you know of his indisposition at the time that Dr. Cottrell attended him?

A. Oh yes, I knew of it.

Mr. Chargin: Purely hearsay, Counsel, but I imagine it is all right.

Mr. Murray: Nothing hearsay about this; this is a professional man on the stand.

Mr. Chargin: I mean the fact as to what Dr. Cottrell may have——

The Witness: I never saw him professionally nor talked with Dr. Cottrell about him at all, only I knew that—I had talked with the nurse, and of course I saw him occasionally. I don't remember

(Testimony of Dr. Arthur T. McGinty.)

whether I went in to see him during the time that Dr. Cottrell was visiting him or not. [128]

By Mr. Murray:

Q. Well, did you observe, as a neighbor, did you observe the way he walked when you first saw him again after that?

A. Yes, I appreciated that he probably had a light stroke, because he cleared up so quickly that I was glad to see how rapidly he was improving.

Q. It was your opinion that he had a slight stroke? A. Yes.

Q. Now, there is one point, Doctor, I would like to clear up on the record. I understood you to say that the particular hemorrhage that caused Mr. Koch's death may have been occasioned by the fall. A. Yes.

Q. Now, which fall did you have in mind, Doctor?

A. The fall that occurred right that morning.

Q. In the bathroom? A. Yes.

Q. Doctor, in connection with your report after his death, after Mr. Koch's death, did you make some kind of an autopsy? A. I did.

Q. And——

A. I had to, to determine what the condition was.

Q. I see. And is that when you discovered the [129] condition of his kidney that you mentioned in the death certificate? A. Yes.

(Testimony of Dr. Arthur T. McGinty.)

Q. Will you state for the record just how extensive an autopsy you had to make in order to determine this?

A. Well, you had to open up the whole abdomen to determine a kidney condition, to get the kidneys.

Q. Well, the kidney condition that you found, did you decide it was something of long standing or something that suddenly happened?

A. The cystic condition undoubtedly was of long standing, an old condition. Those things will go on over years of time.

Mr. Murray: That is all, Doctor.

Mr. Chargin: Just a minute.

Redirect Examination

By Mr. Chargin:

Q. With reference, Doctor, to that cystic condition, it could be possible to have one without giving a person any discomfort or trouble or pain?

A. Yes. They develop—the thing gradually develops, and they develop an immunity to the infection, and they can go along over years with just such a condition.

Q. You did not know previous to his death that he had a cystic condition? [130]

A. Pardon me, a condition like that might have been responsible for a lot of the rheumatic pain that he complained of, where he used this electric ring, over the years.

Q. But you didn't know that he had this cystic condition previously?

(Testimony of Dr. Arthur T. McGinty.)

A. No. He was pretty much of a Christian Scientist when it came to thinking there was anything wrong with himself.

Q. His last illness, from the time that he complained of this severe pain, his death was less than twenty-four hours, is that correct? I mean, death ensued within twenty-four hours of his last illness?

A. Yes. I think I was called in the morning and he died that afternoon. The nurse called me at home early in the morning.

Q. Doctor, you had no particular examination of Mr. Koch that would indicate to you that he was suffering from a stroke; in other words, you didn't treat Mr. Koch in the first part of 1938, did you?

Mr. Murray: If Your Honor please, this is re-direct examination, as I understand, and I object to leading questions.

Mr. Chargin: Well, no.

The Judge: Objection overruled.

By Mr. Chargin: [131]

Q. Never treated Mr. Koch during the spring of 1938? A. No.

Q. And therefore you never diagnosed the matter as being a stroke, his illness, in the spring?

A. Only by that, as I explained awhile ago, in my medical training and observation.

Q. I see. Well, you were advised that Mr. Koch received or had a stroke, is that right, primarily? A. What?

(Testimony of Dr. Arthur T. McGinty.)

Q. You were advised by someone that Mr. Koch was supposed to have had a stroke in the spring of 1938?

A. No, I saw him getting around, after he was up and about.

Q. I see. But you didn't prescribe for him?

A. No.

Q. Either during the month of March, April and May?

A. No, I didn't have anything to do with him. As I told you, I saw him improving rapidly every day, and I knew it wasn't going to amount to anything.

Mr. Chargin: All right. No further questions.

Mr. Murray: I have another question or two, if Your Honor please.

Recross Examination

By Mr. Murray:

Q. Dr. McGinty, did I understand you to say that [132] you attended Mr. Koch in connection with the automobile accident? A. Yes.

Q. And I understood you to say, I believe, further, that this time that you attended him was sometime after the accident, or did you attend him right at the time?

A. Well, I attended him right after the thing happened. But there wasn't anything to be done for him, without gambling on getting a great big isolated blood clot, and I just didn't do anything. We talked about it, and I examined him frequently. And when I saw the thing beginning to

(Testimony of Dr. Arthur T. McGinty.)

resolve, in other words, to liquefy, then I advised that we had better just put a syringe needle in there and draw the fluid out, which I did on a number of occasions.

Q. Can you recall at all how long later that treatment of drawing off the fluid was prior to his death? A. Before his death?

Q. Yes, approximately.

A. Well, I really don't remember when that accident was. I think it was several years before his death.

Q. Well—

A. And the drawing off of the fluid was just a matter of, oh, I think at most probably six to eight weeks after. [133]

Q. What kind of a scar, if any, did you find this injury to leave?

A. It wasn't a scar. I think the skin was abraded a little at the time, but he had a great big depression in the muscle. The muscle must have broken. He must have got hit so hard that it cut the muscle under the skin. Because there was a great big depression. You could put your fist down into it.

Q. Where was that depression on his body, Doctor, if you please?

A. As I remember, it was right over the gluteus muscle.

Q. In the right hip? A. Yes.

Mr. Murray: That is all. That is all.

Mr. Chargin: Are you finished?

No further questions.

Mr. Murray: Thank you very much, Doctor, for coming over.

Mr. Chargin: Will you take the stand? Where-upon

NELLIE V. RICHARDS

was called as a witness for and on behalf of the Petitioner and having been first duly sworn and examined and testified as follows: [134]

Direct Examination

By Mr. Chargin:

Q. Your name is Nellie V. Richards?

A. It is.

Q. And you have a place of business at 282 South Third Street? A. I do.

Q. And what is your business?

A. I am an optometrist.

Q. I see. Where are your offices with respect to the home of Mr. Koch?

A. It is directly across the street.

Q. I see. And had you known Mr. Koch previously to the time of his death? A. I did.

Q. And for how long a time?

A. Well, the first time I remember Mr. Koch was in May, 1933.

Q. May, 1933? A. Yes.

Q. And did you see him after that time very often?

A. Well, I saw him as he left and entered his

(Testimony of Nellie V. Richards.)

home, and saw him drive out in his automobile. I saw him often.

Q. I see. Did you see him during the year 1937 and [135] '38? A. Yes.

Q. Did you ever fit him with glasses?

A. I did.

Q. And in what year did you fit him with glasses?

A. I fitted him with glasses on April 5th, 1938.

Q. April 5th, 1938. And what was the condition of his eyesight at that time?

A. Well, he had astigmatism.

Q. Yes. A. Myopic astigmatism.

Q. Did you ever see him drive an automobile during the year 1938?

A. Oh yes, I am sure he did.

Q. Yes.

A. I am sure I saw him, because he was—I made his glasses in that time, and he was all right, then he was driving his car.

Q. Yes. Did you ever talk to him off and on as a neighbor there, see him across the street and talk to him?

A. Oh yes, I am sure I saw him at least twice a week.

Q. Twice a week. Where would you see him, out in front of his house, or something of that kind?

A. Well, I would see him—he would come to the [136] office. And I talked to him in his garden and in his house, and in his home.

(Testimony of Nellie V. Richards.)

Q. What was his disposition when you spoke to him, as far as you could determine?

A. Well, he was always of very happy disposition.

Q. Was he able to get around, physically, in 1938 and '39? A. Yes.

Q. Did he have a cane or not?

A. Well, he may have—it seems to me I saw him with a cane a time or two.

Q. I see. Did you ever see him pose for some photographs during the year '39? A. Yes.

Q. Where was that at?

A. It was in his own yard, his front yard.

Q. His front yard. Are you able to fix the time, what month, do you know?

A. Well, I would say it was five or six weeks before he passed on.

Q. Five or six weeks before he passed on. And who took his picture, do you know?

A. Well, I know it was a neighbor, a young lady across the street. I don't remember her name.

Q. Yes. And at that time was Mr. Koch able to [137] walk around and get around?

A. Well, yes, he was able to move about.

Q. Did he ever discuss your business affairs with you?

A. Well, he sat in his front window and would watch for me to come down to the office, and as I stepped out of my car I would see him and wave at him. And he would chide me for being late. If I wasn't right on time, he noticed it. And I would

(Testimony of Nellie V. Richards.)

go across the street, and perhaps I would explain, I would say "Now, Mr. Koch, I had to stop on the way down, I didn't have any appointments but I needed to attend to some errands."

Q. And what would he say to you?

A. He would say "Well, you must tend to business."

Mr. Chargin: No further questions.

Mr. Murray: No questions.

Mr. Chargin: Mr. Rudolph?

Whereupon

PAUL RUDOLPH

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: And what is your name, please?

The Witness: Paul Rudolph. [138]

Direct Examination

By Mr. Chargin:

Q. Your name is Paul Rudolph? A. It is.

Q. And what is your profession or occupation, Mr. Rudolph? A. Banker.

Q. And with whom are you associated?

A. First National Bank.

Q. And what is your position with the First National Bank?

A. Vice President and Cashier.

(Testimony of Paul Rudolph.)

Q. And how long have you been connected with that bank? A. Thirty-eight years.

Q. Was Mr. Koch a depositor of your bank?

A. He was.

Q. And for how many years was he a depositor, do you know?

A. He was a depositor all the years that I have been there.

Q. I see. Mr. Koch had substantial sums of money in your institution? A. He did.

Q. How long had you known Mr. Koch, personally, [139] could you say?

A. Thirty or more years.

Q. Thirty or more years. Would you see him in your bank during the years '37, '38 and '39?

A. I did.

Q. How often would you see him there in '38?

A. Oh, I would say maybe once a month.

Q. I see. A. That is to my own knowledge.

Q. Did he ever discuss business with you, business affairs? A. He did.

Q. Did he ever discuss the affairs of the San Jose Building & Loan Association with you?

A. He did.

Q. Did you ever see him in '39, in the year of '39, the year of his death?

A. In the early part of it.

Q. In the early part of it. Would you state on how many occasions do you know?

A. Oh, two or three times, I would say.

Q. And where would you see him, in your bank?

(Testimony of Paul Rudolph.)

A. In the bank.

Q. Was anyone with him when he would come or would he be by himself? [140]

A. Sometimes George was with him and sometimes he would come over and talk with me, personally.

Q. I see. Was he able to get around at that time? A. Yes.

Q. What was his disposition with regard to being either cheerful or otherwise?

A. He was always cheerful.

Q. He was. Would you consider him in 1939 capable of conducting business affairs?

A. I would.

Mr. Chargin: No further questions.

Mr. Murray: No questions.

Mr. Chargin: Mr. Snyder.

Whereupon

CHARLES L. SNYDER

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: What is your name?

The Witness: Charles L. Snyder, S-n-y-d-e-r.

Direct Examination

By Mr. Chargin:

Q. What is your name, please?

A. Charles L. Snyder.

(Testimony of Charles L. Snyder.)

Q. And what is your occupation, Mr. Snyder?

[141]

A. Merchant.

Q. Beg pardon? A. Merchant.

Q. And how long did you know Mr. Koch previous to his death? A. Thirty years.

Q. Thirty years. Was he a member of an organization of which you were a member?

A. He was.

Q. And what was that?

A. Knight Templar.

Q. And did he take an active interest in that organization? A. Very definitely.

Q. Did you ever go to visit Mr. Koch at his home? A. Very often.

Q. Very often. He was a personal friend of yours? A. He was.

Q. Did he ever discuss any gifts that he had made to fraternal organizations with you, or anyone in particular? A. He did.

Q. Which ones—what was the conversation and what did he say to you?

A. He told me that he had given \$100.00 to the ladies' organization connected with the Knights Templars [142] for the purpose for which they were organized, and for a Christmas gift. I think that was in 1938.

Q. '38.

A. And that he anticipated making a similar gift each year following.

Q. I see. Did he ever discuss with you any of

(Testimony of Charles L. Snyder.)

his problems with his son, or his grandson, as far as you remember? A. Indirectly.

Q. Indirectly.

Mr. Chargin: No further questions.

Mr. Murray: No questions.

Mr. Chargin: Mr. Drew.

Whereupon

JOHN H. DREW

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: Your name, please?

A. John H. Drew, D-r-e-w.

Direct Examination

By Mr. Chargin:

Q. What is your occupation, Mr. Drew?

A. Secretary, San Jose Building & Loan.

Q. Secretary. And how long have you been the [143] secretary of that Building & Loan Association? A. For over ten years.

Q. And how long have you known Mr. Koch?

A. Since 1924.

Q. What was his position during the early twenties with the association, or thirties?

A. Well, he was president at one time, and at other times—at another time he was vice-president.

(Testimony of John H. Drew.)

Q. Yes. And was he a director of that association during the year '37 or '38? A. He was.

Q. And particularly in '38 did he hold any official position with the Board, or just a director?

A. He was the Vice President.

Q. He was Vice President?

A. I believe, yes.

Q. Yes. And did he attend the meeting of the Board in '37, regularly? A. Yes.

Q. And did he attend meetings of the Board regularly in '38?

A. Yes. He was absent, I believe, two meetings in 1938.

Q. He was only absent two meetings in '38. And how often would you meet? [144]

A. Once a month.

Q. Once a month.

A. That is the regular Board, and then we had committee meetings, otherwise.

Q. I see. When he attended these Board meetings did he take an interest in the association's affairs? A. He did.

Q. And with regard to the loan that Mr. Faber Johnston spoke of, the discussion of a repayment of a loan, was he present at that time when this took place? A. He was.

Q. And will you testify as to what happened there?

A. Well, he really led the discussion and made the motion to accept the payoff of this large loan, without a prepayment charge.

(Testimony of John H. Drew.)

Q. Yes. That was when, do you know? December?

A. December; I believe it was on the meeting of December 21, 1938.

Q. In December of 1938 you feel he was competent to take care of his business affairs?

A. Yes.

Q. And discuss important matters?

A. Yes.

Q. Now, I will show you this: Is that your signature there? [145] A. Yes.

Q. Certifying to that document?

A. Yes, it is.

Mr. Chargin: We would like to introduce in evidence a purported certified copy of a resolution of the Board of Directors of that association.

Mr. Murray: Objected to on the basis it is irrelevant and immaterial, if Your Honor please.

The Judge: It may be handed to the clerk and marked Petitioner's Exhibit 3 for identification.

(Whereupon the resolution above referred to was marked Petitioner's Exhibit No. 3 for identification.)

The Judge: I haven't seen it. What does it purport to be?

Mr. Chargin: It purports to be a resolution of the Board of Directors of the Association adopted on the 21 of December, '38, wherein the motion was made by Mr. Koch authorizing the elimination of a prepayment penalty with regard to the Building & Loan on this loan payment.

(Testimony of John H. Drew.)

The Judge: Objection will be overruled. It will be received as Petitioner's Exhibit No. 3.

(Whereupon the resolution heretofore marked Petitioner's Exhibit No. 3 for Identification, was received in evidence and marked Petitioner's Exhibit No. 3.)

By Mr. Chargin: [146]

Q. You said that that was your signature down there? A. Yes, that is my signature.

Mr. Chargin: I want to read this in the record.

The Judge: You need not; it has been received.

Mr. Chargin: Very good.

By Mr. Chargin:

Q. I call your attention to that document. The meeting of the Board of Directors you refer to took place on what date?

A. December 21st, 1938.

Q. December 21st, 1938. All right. What kind of a man was Mr. Koch with regard to business affairs, in handling the association, even during the year 1938, '37?

A. Well, Mr. Koch was always the one to watch the expenses and always checked pretty carefully on that angle of the business.

Q. When he would come—— What was his condition of health, so far as you were able to observe, during the year '38?

A. He was able to get around.

Q. Could get around?

A. He came in the office frequently.

(Testimony of John H. Drew.)

Q. Do you know who he would come to the office with, whether he would be driven there, or walk there, or how?

A. I don't know exactly. I believe that our Mr. [147] Cowell called for him a time or two. I don't know whether that was in '38. He would call for him. Whether it was in '38 or early '39, I am unable to say.

Q. Did you ever see him walking around town, or around the business section during the year 1938?

A. Oh yes.

Q. I see. Was he able to get around unassisted by anybody? A. Yes.

Q. I see. Was it his custom to visit with the employees of the association whenever he dropped in there?

A. Yes, he usually talked with the different ones.

Q. He was on good terms with most of the employees, then, particularly the officials, that is correct? A. Yes, friendly terms.

Q. What was his disposition?

A. It was always cheerful, and inclined to kid, in his way.

Q. All right. [148]

MRS. ANGELINE COMPTON

was called as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

The Clerk: And your name?

(Testimony of Mrs. Angeline Compton.)

The Witness: Mrs. Angeline Compton.

Direct Examination

By Mr. Chargin:

Q. Your name is Angeline Compton?

A. Yes, sir.

Q. And where do you reside now, Mrs. Compton?

A. 267 South Third.

Q. 267 South Third. And about how far is that from the former residence of Mr. Koch?

A. Just the second door.

Q. The second door from him?

A. Dr. McGinty is between.

Q. Yes. [152] A. 285, and 267.

Q. I see. And what is your occupation?

A. I have been practical nurse for about fifteen years.

Q. I see. And were you employed by Mr. Koch at any time?

A. Yes. He employed me in April, '36 as his housekeeper.

Q. April, '36. And up to what time did you work there? A. From April, '36 to April, '37.

Q. And where did you go after '37, after you left his employ?

A. He was going to make a trip to Denver, and I made a trip back to Nashville, Tennessee to my old home.

Q. Do you know whether he went to Denver that year? A. Yes, I know he went.

Q. He went to Denver in 1937?

(Testimony of Mrs. Angeline Compton.)

A. I had a letter from him after he got there.

Q. I see. And when did you return back from Tennessee?

A. I returned back that same summer, three or four months afterwards.

Q. I see. Did Mr. Koch own a car?

A. Yes. [153]

Q. A personal car? A. Yes.

Q. When did he buy a new car, do you know?

A. Well, I don't remember when he bought the new car; it must have been '38.

Q. Why do you say it must have been '38?

A. Well, because I was living over on 6th Street.

Q. Yes.

A. And I went down to Hale's store and I came by. I was living there in '38.

Q. Yes.

A. And I came by, and he was out in the yard. And he says "How do you like my new car?" I said "So you have got a new car?" And he said "Yes." He says, "Get in, and I'll take you home." So I got in and he drove me up San Carlos up to 7th and came down and put me out at 6th.

Q. I see. Did you see him drive at any time during the years?

A. Oh, numbers of times he took me over to his barber, after I was back employed with him the second time.

Q. When were you again employed by him?

A. The next in '38.

Q. In '38? A. Yes.

(Testimony of Mrs. Angeline Compton.)

Q. And what time of year was that now? [154]

A. About May, I think.

Q. About May? A. Yes.

Q. Now, do you recall the time that you came into his house and found Mr. Koch——

A. Well, that was in May.

Q. May of '38?

A. I had been to Hale's store, and I came by, and as I often did, stopped in, when I didn't see him on the porch I went in.

Q. Yes. A. And he was lying on the bed.

Q. Were his feet on the bed?

A. No, he had his shoes on.

Q. He had his shoes on? A. Yes.

Q. How was he dressed?

A. Had his trousers on and his house coat.

Q. Yes.

A. And I said, "What's the matter, are you sick?" He said, "No, I was in the bathroom shaving and I fell and hurt my hip."

Q. Was there anything else that you observed wrong with him at that time?

A. Well, I noticed that his two fingers here had a [155] little blood on them. And I supposed he struck them against the bathtub, because there was blood on the bathtub. And these two fingers swelled up and they kind of scabbed over and got well then. But they were a little bit stiff, swollen a little, and just a little stiff.

Q. Now, at that time did you call a doctor?

A. Yes, sir.

(Testimony of Mrs. Angeline Compton.)

Q. At whose request?

A. Well, I didn't know who to call, and Mrs. Fred Doerr——

Q. Yes.

A. (Continuing) ——told me, she said "Dr. Cottrell is a good doctor," and so I called him.

Q. Did Mr. Koch ask you to call a doctor?

A. No, he didn't. I didn't let him know I called him.

Q. He made no request for a doctor at that time?

A. Never did.

Q. So you called Dr. Cottrell then?

A. Of my own accord.

Q. Yes. And how often did Dr. Cottrell come to visit him?

A. Well, I called his son, Mr. George Koch.

Q. Yes.

A. And he and Mrs. Koch came over, and Dr. Cottrell [156] came every day, then.

Q. Yes.

A. He said—when he came, he didn't examine any place in his body, except he took his temperature and his blood pressure.

Q. Yes.

A. And he said "Well, stay in bed a few days and you will be all right."

Q. Yes.

A. Well, Mr. Koch didn't want to stay in the bed. And he stayed in the bed, though, for a day or two, and then he would get up. And I would take him

(Testimony of Mrs. Angeline Compton.)

to the bathroom. But this left leg was always giving him trouble.

Q. What was the condition of that left hip or left leg; I mean, did you ever see it?

A. Yes. Right on the joint of the left hip, right on the joint, where it works together——

Q. Yes.

A. (Continuing) ——was all knocked in, had sunken in; the whole cap of that left hip was knocked in. And he said it was when Mr. Sheppard hit him with an automobile.

Q. Yes.

A. And in '36 when I was with him he would use this rubber ring. And Mr. Swickard would come in and say "A. J., how's the barometer?" He said, "Well, it is going to rain," [157] and he would laugh at him. He called this hip his barometer; he could always tell when it was going to rain. But we laughed about it, but the next morning it would be raining.

Q. So during the time that Dr. Cottrell was treating him he was not bedridden all the time?

A. Well, he wasn't only when the doctor came.

Q. And he got up and around? A. Yes.

Q. And sat in his chair?

A. Yes, and sat up and walked to the bathroom several times. But I tried to keep him in the best I could, because the doctor said to.

Q. Did Mr. Koch ever make any remark about the doctor staying there too long or coming too often to see him?

(Testimony of Mrs. Angeline Compton.)

A. Well, he kept a-coming, and I suggested—and I went out on the porch with Dr. Cottrell, and I suggested to the doctor “Do you think it is necessary for you to come every day?” He said, “Did he say anything about it?” I said, “No, but,” I said—He wasn’t giving him any medicine, never gave him anything. And Mr. Koch would laugh, he would say, “Well, the doctor just tickles me on the toe.” The doctor would come and tickle his toe, and he would jerk his foot that way, you know, when he would tickle his toe—Mr. Koch would jerk his foot. He would say, “Well, you’re coming, you’re coming.” I said to the doctor, “Do you think [158] it is necessary to make a trip every day?” “Did he say anything about it?” I said, “No, but I just thought it wasn’t necessary.” “Well,” he said, “George told me to keep a watch on him.” So Mr. Koch and I talked about it. I told him what I said to him. He said, “Wait until George comes and he can pay him off, and then he will stop.” He quit then.

Q. During the year 1939 was Mr. Koch able to get around?

A. Sure. He had his hair cut every month, and he did his own shaving at home; he had his electric razor, and once a month he would go to the barber and have his hair cut. And when he lived at the first house on San Carlos, well, he walked over to San Antonio, right at KQW was a barbershop.

Q. How far was that from the home?

A. That was just a block. And three weeks, to

(Testimony of Mrs. Angeline Compton.)

the very day, every time it come his day to have a haircut, he went. And this time, it was just three weeks, just the last—it was in June, the last month he lived, I went with him down to this barbershop by the side of KQW. There was a customer in the chair. I said, “Well, I am going back home and I will come back for you.” And he walked with his cane. So I went back home and I asked the barber how long it would be before I must come after him; he said, “Oh, half hour.” So I went back and came back and he was gone. I said, “Well, [159] where has he gone to?” He said, “He went this way.” Pointed towards Second Street. Well, I went on down Second, and when I got there by the Baptist Church I looked up the street and he was just going in Mr. Thompson’s, Percy Thompson’s office.

Q. He is a real estate man?

A. He was just going in there. And Mr. Thompson came down to see him quite often. So I went on up, didn’t let him know that I was there. He was standing—he didn’t sit down, he was standing, talking to Mr. Thompson. So I went across the street to see where he would go. He came out and he went down and cross San Antonio by the Y there, went on down—Mr. Louie Doerr was living there on that street then. And he stood there and talked to Mr. Louie, and went on past the undertaker shop there where Zinke’s is now. And I went over and talked to Mr. Doerr. And he said, “He is a curiosity, isn’t he?” I said, “I am going across

(Testimony of Mrs. Angeline Compton.)

the parking lot and beat him home." So, he went on down to San Carlos and came around. And when I got to the home I went—I saw him up by—just across by the filling station, and I went up to meet him. And he laughed, he said, "How did you know where I was?" I said, "I was keeping tab on you." So he came on in home.

Q. And that was, you say, three weeks before his death?

A. That was in June, before he died the 29th of June.

Q. Who prepared his meals for him? [160]

A. I did.

Q. You did? A. Yes, sir.

Q. And how was his appetite?

A. Couldn't have been better.

Q. What do you mean by that, what would he eat?

A. He ate anything that he could get ahold of.

Q. Did he have any particular pet appetites or desires that he wished filled?

A. No. The doctor said to feed him lightly, I did at first, but otherwise he ate anything he wanted.

Q. Previous to his illness in May, when he fell down there, was his appetite good in 1937?

A. The last night—the last day he lived he ate a good breakfast and a lunch—we always called it dinner—and supper.

Q. Yes.

(Testimony of Mrs. Angeline Compton.)

A. And I didn't see any change on him at all the 28th of June until after I put him to bed that night. And in about an hour—he always went to bed at eight o'clock, he got up about five—and I put him to bed, and in about an hour after I put him to bed he called to me. And he said, "I have a hurting down here." And he couldn't urinate.

Q. Yes.

A. So I called Dr. McGinty. And Dr. McGinty tried [161] to catheterize him, and he couldn't. But that morning, the morning of the 28th, he was in the bathroom and shaved, and the last thing he would always do would be to shave and wash his hands and face and comb his hair before he went into the room. So, he was standing right in front of the mirror where he combed his hair, and he cleared his throat, and I turned to get some paper for him to expectorate on, and he fell, standing straight up, right where he went to turn. Every time he would turn around this hip seemed like it would get out of place. And he fell and I caught him, but his weight pulled me down; we both fell on the floor. Then I got him up and put him on the bed. And he stayed there awhile, and then he came in to the front and sat in his chair the rest of the day, and he ate his dinner. And that evening then, why,—he always ate an early supper.

Q. Now, going back to 1938, on Christmastime when they had that breakfast over——

(Testimony of Mrs. Angeline Compton.)

A. The Knights Templars.

Q. Over at the Knights Templars organization, do you recall going down there with him?

A. Yes, sir, I went with him.

Q. And was he in charge of that breakfast?

A. He went down and bought everything beforehand, and I took him down, went down with him the night before.

Q. Yes. [162]

A. He wanted to see that the tables were all fixed and everything, the decorations were all right.

Q. How did you go down the night before?

A. He and I walked down.

Q. Walked down?

A. Yes, sir. He and I walked down.

Q. Did he have the chair there that night?

A. No, he didn't have the chair; the chair was out in the garage. We kept it out there. He didn't want to ride in it.

Q. Would you explain the circumstances of that chair, who gave it to him?

A. It belonged to the Knights Templars Mr. Doerr said, and Mr. Fred Doerr brought it over there, thinking that it would be a help to him.

Q. Yes. Did Mr. Koch want to use the chair?

A. He didn't like to ride in it, and I didn't like to push it.

Q. And so he preferred to walk?

A. Yes, sir, he preferred to walk.

Q. But that Christmas morning he did use the chair?

(Testimony of Mrs. Angeline Compton.)

A. Christmas morning I took him down and he had his—he ate a hearty breakfast, a big breakfast, and he made a little speech.

Q. He did? [163]

A. Yes, sir, he made a little talk.

Q. Did he ever have any discussion with you about people interested in him for his money?

A. Yes. I came home one day from the grocery store, and there was a lady—— He was out in the lawn, watering the lawn.

Q. Do you know what year that was, about what year?

A. Oh, that was within a month or two before; that was in '29.

Q. Thirty-nine.

A. Thirty-nine, I mean, yes. This lady was out there. I didn't know her. And when he came in the house, he laughed, he says, "These women are sights," he says, "this woman wanted me to take her for a ride, wanted to know why I didn't ever come to take her for a ride."

There was a lady rooming in the next door there in Dr. McGinty's, rooming and boarding there, and every time he would go out in the back yard he would run into her, so he turned around and came back one morning. I saw him twice do that. He says, "I don't know what these women mean." He says, "She is wanting to get in with me." So I was out, he was to town, and I was out in the back yard and hanging out some clothes, and she came

(Testimony of Mrs. Angeline Compton.)

over to me and she says, "Why don't you set your cap for that old man?" I says, "Well, I don't know, I don't want to marry, that is all I know." [164] And she says, "Well, if you don't want him, put me on," she says, "you will get plenty of money." And there were several women came and talked to him, and he would laugh about them.

Q. And he was aware of that, was he?

A. Oh yes, he knew it. One woman got mad at me, one old maid. She clerks at Hale's now. She got mad at me, won't speak to me to this day because I wouldn't let him answer a card. I didn't even know her, and she wrote him, and he wouldn't answer it, and she thought I was to blame for it.

Q. Did he have a photograph taken in 1939 of himself? Someone take a picture of him?

A. Yes. He had one taken in the front. He had one taken with Dr. Richards.

Q. Do you have that photograph with you?

A. Then we had some taken on Sunday, two weeks before he died.

Q. Have you got any photographs taken of him?

A. I wanted to have these made because I wanted his grandson—a picture of him made with his two grandsons so I could show them to my Tennessee folks.

Mr. Chargin: Do you care to look at these, counsel?

The Witness: That was in the back yard, on Sunday, and he only lived one Sunday after that.

(Testimony of Mrs. Angeline Compton.)

By Mr. Chargin:

Q. I will ask you when was that taken about, do you know?

A. Well, this one was made—the girl across the street came over and made this, and made one of Nellie. Nellie came in just then and she run over and had herself made with him. This was about three months, about three months before he passed away; not over that.

Q. And when were these taken?

A. They were taken the Sunday the week before he passed away.

Mr. Chargin: All right, we would like to have these introduced in evidence.

The Judge: Any objection?

Mr. Murray: No objection.

The Judge: They may be handed to the clerk and marked Petitioner's Exhibits Nos. 4, 5 and 6, and will be received in evidence.

(Whereupon Petitioner's Exhibits 4, 5 and 6 were marked by the clerk and received in evidence.)

By Mr. Chargin:

Q. Did Mr. Koch show some interest in his neighbors during the last year of his life?

A. Do what?

Q. Show interest in his neighbors and their affairs. [166]

A. Oh yes, he was very much interested in them.

Q. Would he talk, in the neighborhood, to people?

(Testimony of Mrs. Angeline Compton.)

A. He talked to everyone. He had a world of friends that came to see him, and he talked with them.

Q. Who particularly would he talk with then and visit, if you know?

A. Well, he often went over and talked to Mrs. Richards, and he also went over to the filling station and talked with the men there.

Q. Now, did he ever discuss with you during the year '38 his affairs concerning either George or his grandson Ralph?

A. Yes, he talked about them and told me everything, I guess, from start to finish.

Q. What did he talk about with regard to Ralph, the grandson?

A. Well, he had a great feeling for Ralph, because he was left a baby, his mother died when—he said—when he was four or five days old. And he said that Ralph was kind of kicked out. His stepmother had a son of her own, and she had an electric washing machine and a Japanese girl there, but she wouldn't let Ralph have his handkerchiefs and clothes washed there, so he had to bring them over to his grandpa's, and I helped wash them.

Q. Ralph brought his clothes over? [167]

A. Ralph would bring them over to his grandpa's and washed them on a rub board. I went to help him. I felt sorry for him, myself. And I did all the ironing, and I did the mending of anything. And that is what hure Mr. Koch. It just broke his heart. And so Mrs. Swickard, his stepmother,

(Testimony of Mrs. Angeline Compton.)

came over one day and was talking to him about she didn't want Ralph to go to Stanford. And Mr. Koch said "Well, Ralph is going to Stanford." Ralph wanted to go to Stanford, too. So I went with her out on the porch. And she rehearsed a whole lot to me about it. I came back and I said, "I can't understand why Mrs. Swickard doesn't want Ralph to go to Stanford." I said, "She is jealous because her boy couldn't go." She said they weren't able to send him. Her first husband and her had separated, said she wasn't able to send him. He says, "I am going to give Ralph a good education and put him in business." He said, "He has got no home, he has got no mother."

Q. When did he say that, do you recall what time that was?

A. Well, Ralph finished high school.

Q. What year would that be, in '38?

A. That is the spring—summer of '38.

Q. Summer of '38.

A. And he was going to enter college then that fall.

Q. I see. [168]

A. So then is when he wanted—and he says "You admonish Ralph," he says, "I want him to make a businessman." He says, "I don't want him to make a fiddler," he says, "I want him to make a businessman. And, you admonish him never to smoke cigarettes." He said there was four generations of the Kochs and none of them ever smoked.

(Testimony of Mrs. Angeline Compton.)

Q. Was the deceased, Mr. Koch, generous with his relations?

A. Well, yes, he had a feeling for every one of them. He said it hurt him worse to leave his baby brother, than all the rest of them. He left home when he was only sixteen years old, so he told me. And he said he came to this country, and he said it hurt him worse to leave Carl than it did any of the rest of them, or all of the rest of them.

Q. Do you know of any other gift he made to other members of his family?

A. Well, he had——

Q. In conversations with you?

A. Well, he had a niece in San Francisco.

Q. Yes.

A. That wasn't married. And she was sick, and he said he was going to give her—going to help her. "Now," he says, "the other nieces may feel sore towards me because I don't give them any, but," he says, "they have got a husband to work for them, and I am not going to help them." [169] That is what he told me, that he was going to give this niece that was not well in San Francisco, and had no home.

Q. Did he ever discuss the matter of giving money to his son George, or in your presence, or to you?

A. Well, he said this: He said, "When Hilda was in school, and George," he said, "I gave Hilda \$2.00 every Sunday." He said, "She needed a little spending money and she helped her mother and she

(Testimony of Mrs. Angeline Compton.)

had no way of making it, and," he said, "I made George work for what he got." He said, "George kind of thought I was sore at him, but," he said. "when George got older," he said, "Pa, you done right," he said, "you should have given it to Hilda." He says, "I have only got the two, and I am giving Ralph this money to put him through Stanford, and," he says, "I am going to give George the same amount." I don't know how much the amount was, but he said he was going to give him the same amount.

Q. Did he ever discuss in 1938 or '39 about going to see his brother Carl again?

A. Yes, he was going to have a new plate, going to have his upper teeth pulled. He had one tooth here, and then on one side they were all out. And he asked me who would be a good dentist. I told him that Dr. Hart was the best I ever had.

Q. Yes.

A. And he said, "Well, I am going to have my lower [170] ones"—he says, "they do all right, but I am going to have my upper teeth taken and a plate made." And he said he had a letter from his sister-in-law and she told him about Carl failing. It worried him. He said, "I was out there a year ago and straightened Carl's business up, and," he said, "I told him if he didn't get rid of this partner he would ruin him." And he said, "Now, he is ruined." He said, "I squared his bills all up and put him on his feet again, in '37."

(Testimony of Mrs. Angeline Compton.)

Q. Yes.

A. So he got this letter from his sister-in-law and he sat down and wrote her and asked her how much behind he was and what it would take to straighten it up. So he worried quite a bit about it. He said, "Carl is my baby brother." And he loved Carl and he thought the world and all of him. And he says, "I am going to help him out." And he asked me to make the check out for him. And he says, "You can write better than I can." So I made the check out. I made it wrong. I went on in to prepare his lunch and he called to me. He says, "Mrs. Compton," he says, "there is something wrong, something not right about this." I guess he didn't want to hurt my feelings, to tell me I had made a mistake. So I looked at it, I said, "Well, I guess I misunderstood you." I says, "I'll make it over." "No," he says, "I'll fix it." So he fixed it, himself.

Q. Well, do you know whether he was going to see [171] George in Denver again? A. Carl?

Q. I mean Carl.

A. In Denver. Yes, he told me that when he got his teeth, got his new teeth he would go out there, and I might go as far as he did, as far as Denver, and then I could go on to Tennessee and visit my people, then he said I could come back and come back with him.

Q. Do you know what year that was that he had contemplated the trip to Denver?

(Testimony of Mrs. Angeline Compton.)

A. That was about three months before he passed away.

Q. Did he ever discuss with you or say anything about death, in your presence?

A. No, never heard him mention dying.

Q. Never heard him mention dying?

A. Not a time. And I was with him day and night and he never mentioned it.

Q. What was his disposition with regard to his outlook on life?

A. Oh, he was jolly and told lots of jokes, and I told him a lot of jokes and we got lots of good laughs out of it. And he enjoyed Nellie coming over, because they joked a lot.

Q. At the time of his death then—— How long was he ill, then, at the time of his death? [172]

A. He died on the 29th, June 29th, about two or three o'clock.

Q. Yes. A. In the afternoon.

Q. Yes.

A. And the 28th, in the morning about nine when he——

Q. Fell?

A. (Continuing): ——was fixing himself in the bathroom, he fell. As I said, I put him on the bed. He stayed there an hour or two, then he came on in and sat on his chair, then he came out to the dining room and ate his lunch. And that night he ate his supper and went to bed, and in an hour's time after he was in bed, why, he had this trouble, he

(Testimony of Mrs. Angeline Compton.)

couldn't urinate. And he died the next day. He never missed a meal. At three o'clock that morning I gave him a cup of coffee and a bowl of oats.

Q. Did he ever say how long he was going to live?

A. No. He said he was going to live to be a hundred. I would say "Yes, I am going to live to be a hundred, if I don't die."

Mr. Chargin: No further questions.

The Witness: His appetite was wonderful.

The Judge: Wait a minute.

Mr. Chargin: Excuse me.

The Judge: Any cross-examination? [173]

Mr. Murray: Not that I have noticed yet, there is no cross-examination. I mean, I didn't know you were through.

Mr. Chargin: Yes.

Mr. Murray: I beg your pardon, I didn't hear you.

No, no cross-examination.

Mr. Chargin: You were going to say something about his appetite.

A. In February, after this Christmas breakfast——

Mr. Chargin: You don't object?

Mr. Murray: No.

A. (Continuing): I don't know whether it was at the Knights Templars, but I think it was the Ladies Auxiliary, or something, whatever it is, I don't know about it, they invited him down to the dinner. And they had spareribs and saurkraut, and

(Testimony of Mrs. Angeline Compton.)

he ate three helpings of saurkraut. And I thought "Well, if you don't die from overeating, I don't know." He had a wonderful appetite. [174]

FABER L. JOHNSTON

was recalled as a witness for and on behalf of the Petitioner and having been first duly sworn was examined and testified as follows:

Further Direct Examination

By Mr. Chargin:

Q. Mr. Johnston, you testified, I believe, this morning, that Mr. Koch was a director of the Building & Loan Association. During 1938, did he have another capacity over there at the association?

A. Well, Mr. Koch was a director and he was the vice-president of the association; he also was on the Securities Committee which had to do with passing upon loans and appraising property when loans were made. And in that connection he used to go out with the committee, which required three members of the committee, to look at a piece of property and inspect the property, then they would discuss it in the office, the appraisal, putting it in writing, which he signed, or the members signed. It took three to make a loan. He worked on that committee.

Q. And in 1938 then he went out and appraised property, looked at property?

(Testimony of Faber L. Johnston.)

A. He inspected properties all the time with the committee. They used to go out, three members would go out and [175] look at a piece of property.

GEORGE ADOLPH KOCH

was recalled as a witness for and on behalf of the Petitioner and, having been first duly sworn, was examined and testified as follows: [176]

Q. Was your father during 1938 able to sign his own checks, and during 1939? A. Oh, sure.

Q. He was. I will show you four checks here, Mr. Koch, and ask you if those checks there were signed by your father, if that is his handwriting?

A. They are.

Q. Now, with reference to the first check, is the entire instrument signed and executed by him?

A. That is his writing, yes.

Q. I see. And what is the date of that?

A. It is November 6, 1938.

Q. November 6, 1938. And who was the payee of that check? A. Carl Koch.

Q. Carl Koch. And the amount thereof, \$1500.00, is that the handwriting of your father?

A. That's right.

Q. Do you recall the circumstances about this check? A. I do.

Q. Would you explain it to the court, as to what

(Testimony of George Adolph Koch.)

took place just about this time, or just previous to it?

Mr. Murray: What check is it? How would the [178] record indicate?

Mr. Chargin: That is a fifteen-hundred-dollar check, the first one I referred to.

The Witness: To Carl Koch.

Mr. Chargin: I wish at this time to introduce this check as an example of the deceased's handwriting, and also for the purpose of evidencing the date of that transaction.

Mr. Murray: No objection.

The Judge: It will be received as Petitioner's Exhibit No. 8.

(Whereupon the check above referred to was marked Petitioner's Exhibit No. 8 and received in evidence.)

[Printer's Note: Petitioner's Exhibit No. 8 is set out at page 291 of this printed record.]

Mr. Chargin: May we also have permission to introduce one dated September 1st, '38, signed by Mr. Koch, and one of October 24th, '38, signature of Mr. Koch, and one of October 31st, '38.

Mr. Murray: No objection.

Mr. Chargin: If we may introduce those next in order. There is no objection, Your Honor.

The Judge: Very well. 9, 10 and 11, three checks.

Mr. Chargin: Four checks.

The Clerk: No, that is one; 8, 9, 10 and 11.

(Testimony of George Adolph Koch.)

The Judge: Very well. [179]

(Whereupon the checks above referred to were marked Petitioner's Exhibits 9, 10 and 11 and received in evidence.)

[Printer's Note: Petitioner's Exhibits No. 9, No. 10 and No. 11 are set out at pages 291 and 292 of this printed record.]

By Mr. Chargin:

Q. Now, with reference to this transaction, as evidenced by the check dated November 6th, 1938, do you recall the circumstances surrounding it?

A. I do. The year before when he went to Denver his brother was in trouble; he gave him either five or ten thousand dollars, and settled his affairs up. He was in the coal and wood business. And instead of going through bankruptcy, my father went back there and went to all of his creditors—I just don't know the amount, but it was between five and ten thousand dollars—and cleaned up his affairs and settled them.

The next year he wrote for more money, and I believe he gave him \$2500.00. And he got involved again and he asked for another fifteen hundred. And this is the one that Mrs. Compton refers to that he asked her to write a check out, and by mistake—I don't know whether she wrote it out for twenty-five hundred or thirty-five hundred, but she wrote it out by mistake. And he didn't want to hurt her feelings, so he tore it up and wrote the correct one, himself. That is the history of that check.

(Testimony of George Adolph Koch.)

Q. Is that completely all in his own handwriting? [180]

A. Yes, sir.

Q. I see. Now, with reference to the next exhibit, the check of September 21, '38, payable to Ralph Swickard, \$500.00. Now, are you able to relate and do you know the facts surrounding that check?

A. I do. But I would have to start in with the one ahead of this, if I may, to give you the history.

Q. Do you know what that \$500.00 was for?

A. Yes. This is the check that he gave Ralph to start in, for his tuition, to start in Stanford University.

Q. I see. And that was in the fall of '38, is that right?

A. That is September 21st, 1938.

Q. What were the circumstances just preceding the execution of that check?

A. Well, the boy didn't have enough credits when he got out of high school, and there was a preparatory school down at Monterey, and the boy asked him to go down there, and Father talked it over with me, and so he had given him \$250.00 to go down to the preparatory school. And that is when the trouble started with the stepmother. The stepmother came to my father and had quite an argument. She said that the boy hadn't gotten his credits down at Monterey, that he had just squandered the money, and if there was any further money to be given, she wanted to handle the funds. And then [180½] my father became very much dis-

(Testimony of George Adolph Koch.)

turbed over that, because they had had quite a few fallings-out because she had never treated the boy right. She said she didn't want him to go to Stanford, that her own boy didn't have an opportunity, and there was no reason that he couldn't go to our State school here and live home. But my father said, "Well, George's boy"—that is my boy—"is going to Stanford, and I want Ralph to have the same opportunity that George's boy had, and I am going to see him through Stanford." So both the father and mother came over to visit him in a day or so. And my father said he was going to give the boy \$500.00 to start Stanford. He had been given his credits. So I came down that next day, my father phoned me, he wanted to see me. And he says, "George, I don't like the way Ralph's father and mother are acting, and," he said, "I gave him \$500.00 and told both the mother and father that the boy had gotten his credits and he was going to Stanford and they said, 'Well, he isn't going to Stanford, we can't see him through.' " He said, "Well, I am going to see the boy through." And so the father said, "Well, how do we know that you are not going to croak, Mr. Koch, and that this money is going to come forth?" He said, "Don't worry about me croaking," he said, "I'll live longer than you do, but," he says, "If I don't, I am going to make provisions with George where the boy will be taken care of."

So that is the story of this check. [181]

(Testimony of George Adolph Koch.)

Q. Subsequent to this time, then, what provision was made for Ralph's education?

A. Well——

Q. (Continuing): ——and future provision?

A. From then in, why, my father and I got together on securities and funds so that the boy could get his education through Stanford.

Q. All right. With reference to the question of getting together on securities, what do you mean? When did you get the securities from your father?

A. Well, this was around the holidays. So he told me to come down around—it was in December, I came down quite a bit. We talked it over, and we went down to the bank and got together, decided on the securities we wanted to take out of the box and put in the boy's trust account.

Q. Now, these transfers were made over at the safe deposit box?

A. Yes, at the First National Bank.

Q. The First National Bank. Now, have you since you were in court this morning—Did you look at this ninety-day report with regard to a list of securities held by you? A. I did.

Q. And does that refresh your memory with regard to these transfers of the \$79,000.00?

Mr. Murray: If Your Honor please, I would like [182] to suggest for the record that as to the ninety-day report I haven't heard any reference to it before, and the record might not be clear on it; I would like to know what this is, please.

Mr. Chargin: It is a report of the government

(Testimony of George Adolph Koch.)

here assessing their determination, as to the deficiency, against all these items.

Mr. Murray: That is the deficiency notice.

Mr. Chargin: The ninety-day letter.

Mr. Murray: Which is in evidence by the pleadings, is that right?

Mr. Chargin: Yes. And I imagine your case will also show this complete report of the Treasury Department.

Mr. Murray: All right.

Mr. Chargin: Q. Now then, are you able to say offhand the nature of the securities that were given you at that time?

A. Yes, they are all here. We took securities, bonds and stocks comparable, that amounted to about \$79,000.00.

Q. Do you know the nature of most of those securities, the kind, what one in particular?

A. Well, I think there was one—it doesn't list it—Item 6, \$15,650.00, I am sure that was 100 shares of American Telephone; it was about 156 then. I don't just recall. [183]

Q. Do you know of any other shares?

A. Here is one, fifty-three hundred. I am sure that if \$5000.00 worth of Edison's bonds of some kind. I just don't recall every item. I could go through here, if you want.

Q. I mean, could you just call the name of some of the stock?

A. Well, yes, there was American Telephone Company; there was 500 shares of Byron Jackson;

(Testimony of George Adolph Koch.)

there was 500 shares of Pacific Gas & Electric preferred; there was \$10,000.00 in cash; there was some Building & Loan stock—just at random, I am just saying that is about what they were. We figured at the time if the boy had this stock and income, if anything would happen to him it was in his name, that I would have the interest on this to put the boy through university. That was the idea in this gift.

Q. And what was the amount there, the approximate amount of the securities transferred to you for Ralph? A. \$79,000.00.

Q. Seventy-nine?

A. Seventy-nine thousand dollars; \$79,001.53.

Q. Did you at that time receive securities for yourself?

A. Yes. And my father said to me “Now, George, I want you to take the same comparable amount for yourself.” [184] Which I did. But there is a difference of \$290.00 there, and ninety-eight cents. And that was in the market value of some bonds.

Q. All right. Now, subsequent to that time did you receive any further sum from your father? What was the date of that, December, '38?

A. Yes.

Q. Give us the date.

A. I don't see any date on this.

The Judge: December 20th, 1938.

The Witness: December 20th, 1938, that's right, yes.

(Testimony of George Adolph Koch.)

By Mr. Chargin:

Q. Now, subsequent to that time, did you receive any more sums? A. Yes, later.

Q. What did you get from your father?

A. Well, I got around \$23,000.00; and also the boy.

Q. And what was it, in cash, securities or what?

A. It was mostly in cash. Some real estate.

Q. Was it in one lump sum or several sums?

A. Well, I drew it out—We had money in the savings bank and we had money in the commercial account, and there was some real estate.

Q. Yes. [185]

A. And there was some building—there was a thousand-dollar building and loan certificate.

Q. I see. Were you present when that was drawn out or did you draw it out?

A. I drew it out.

Q. How did you happen to draw it out?

A. Because I had a joint account with my father.

Q. You had a joint account with your father?

A. That's right.

Q. And did you get anything at that time or were further gifts received at that time for Ralph?

A. The same amount.

Q. The same amount. Was there a slight difference between what you received and what Ralph received?

A. Yes, there was a difference because he had an automobile which he always wanted the boy to

(Testimony of George Adolph Koch.)

have, and he told me to put the automobile in the boy's name. And there was ten shares of First National Bank stock that he told me to keep for myself. And that was the difference; about \$2200.00.

Q. Was that the automobile, the same automobile that he had purchased the previous year?

A. That's right.

Q. When did the boy receive that, do you know?

A. I gave the boy the automobile—I wanted to give [186] it to him immediately when my father died, but his stepmother wouldn't let me give it to him, said he didn't need an automobile. I said, "Well, that is my father's request in his will, whether you like it or not he is going to get it." So I transferred it to his name and gave it to him, and he has got it today.

Q. Now, this other check payable—dated October 24, 1938, payable to Ellsworthy & Company—what is Ellsworthy Company, do you know?

A. Yes, they are a bond house.

Q. What is the amount of that check?

A. \$5164.58.

Q. What was that?

A. He bought five thousand dollars worth of bonds, Chicago Edison, or New York Edison bonds. I have them now. I just don't recall.

Q. Your father purchased those bonds?

A. He did.

Q. On October 24th, 1938?

A. That's right.

Q. And that signature is his own handwriting?

(Testimony of George Adolph Koch.)

A. That's right.

Q. Is the body of the instrument his handwriting?
A. Well, he wrote the whole thing.

Q. The whole thing. I show you a check dated [187] October 31, 1938, payable to the tax collector of Santa Clara County, Roy P. Emerson. What was that for?

A. Well, that is the three pieces of real estate he owned.

Q. What is the amount of that check?

A. \$488.37.

Q. And is that in his own handwriting?

A. That's right.

Mr. Chargin: I think I have a couple more here.

Mr. Murray: Is that another exhibit, may I ask? Have you placed another exhibit in, yet?

Mr. Chargin: No, not as yet. That is the same one. I guess that is enough.

By Mr. Chargin:

Q. Do you know why some of the transfers were made in December of 1938 and some were made in January, '39?

A. Well, yes. Because we had—I think it was a five-thousand-dollar deduction that year, we were allowed a five-thousand-dollar deduction each year, so rather than make it all in December, we waited until the 1st of January so we would get another deduction for tax purposes.

Q. Were you ever advised by your father or

(Testimony of George Adolph Koch.)

his attorney, back sometime in 1930 that he was going to do something for you, or give you something? A. I was. [188]

Q. What were the circumstances, the time and place and what transpired?

A. Well, I was up to the Shrine Temple in San Francisco at the time. They had kind of a punchboard contest where you sell tickets and you get electric toasters and all that kind of stuff. And I was up there getting my toaster, or whatever it was, and I met Mr. Hellwig. I only met the man once in my life. And he come up to me and he was up there getting some kind of a prize, and he said, "George," he says, "your father has been talking to me and said he wanted to make you a present, you and Ralph, of a considerable sum of money, and," he said, "sometime when you are down there, I want you to talk to your father, because he has approached me on that subject." But I said, "Oh, we'll let it go." I never paid much attention to it. So my father approached me one day a few months later, and then is when I got in trouble on this Gorman-Kaiser deal, so we didn't go through with it.

Q. Did you advise your father that you were involved, at that time?

A. Well, he knew it, he knew it because he had helped me out, financially.

Q. Now, this morning you testified that you received some flats at the time you were married. What was the amount?

(Testimony of George Adolph Koch.)

A. Around \$30,000.00. [189]

Q. Did you receive any subsequent sums after that? A. Well yes; forty thousand he gave me.

Q. That was when you went into business?

A. That is when I went into that stock and bond business.

Q. Did you receive any other sums previous to the time you went in the stocks and bonds business?

A. Yes, earlier I got some from him; one time ten thousand, another four. He gave me money from time to time.

Q. How did your father feel towards you with regard to your business capabilities, capacity for making money and so forth?

A. Well, I suppose like all sons, he told everybody else I was a wonderful businessman, but to me he always treated me like a little boy, and I was always just a son. But I think he thought that I was a good businessman. And if he hadn't of thought that, I don't think he would have left this estate to me without—left Ralph's half in my care without any bond, which he did. So, I think my father had a great deal of confidence in me.

Q. On the question of the execution of this trust, how did you go about having this trust prepared, do you recall that now? After the discussion in the fall of the year, about taking care of Ralph's education and so forth, did you see Mr. Johnston, or your father see Mr. Johnston? [190] Do you recall the circumstances there?

(Testimony of George Adolph Koch.)

A. Well, I will tell you. Naturally, with trouble in the family with the stepmother like the boy had, and my father thinking so much of the boy, I didn't want any family troubles. I had never had any trouble with my brother-in-law, and I had never had any trouble with the sister-in-law. I never had any words with them; my father had all the trouble with them on account of the boy, and I wanted to stay out of it. And when we got this money together, my father was very bitter about this woman's treatment of the boy, so he did everything he could for her, and he could never win her over, and he never wanted her to have a nickel of his money; it was an obsession with him, I would say. So he told me, he says "When Ralph gets this money, George, I want it fixed so that Frances will never get a dollar of it." He said, "I don't mind the father getting it, but I never want that woman to have a nickel of it, because she has never been a mother to that boy, and I want you to promise me that." So, I was working at the Hotel Whitcomb then, I was busy, and I would come down here. I had taken the securities home with me, and put them in a San Francisco safe deposit box. So I called up Mr. Johnston here and I said, "Faber, I got these securities for Ralph, supposing something happens to me? My father doesn't never want these to go back to the stepmother's end of the family. What am I going to do?" [191] So Mr. Johnston suggested this trust to me. And I said,

(Testimony of George Adolph Koch.)

“Well, fix it up, I don’t know anything about it.”
And that is the way that trust was made.

Q. Did you go to the office at the time, do you recall?

A. I don’t remember now. I naturally came—I did all my business with him in San Jose, yes. He never came to San Francisco. So it was signed here.

Q. Do you know what the purposes of the trust were, so far as your interests were concerned in it?

Mr. Murray: Your Honor, please, I object to that on the basis the trust is in evidence and speaks for itself.

The Judge: Yes, I think we went over that generally this morning, and the trust is in evidence.

Mr. Chargin: I don’t want to be repetitious, but I thought I might have overlooked it.

By Mr. Chargin:

Q. You were to receive that trust in the event that Ralph should die before he became of the age of thirty-five?

A. That was to go to me.

Q. Yes.

A. In fact, in his will today, the boy doesn’t get his money until he is thirty-five; and if the boy happens to die before then, I get all of his estate.

Q. Now, during the spring of 1938 when your father [192] had Dr. Cottrell attend him, do you know what took place, or did you come down and see your father during the month of May?

(Testimony of George Adolph Koch.)

A. Yes. I got a phone message from Mrs. Compton, who was housekeeper for him, that my father had taken ill, and she had called Dr. Cottrell. I had never met Dr. Cottrell and I was surprised that they got Dr. Cottrell, because Dr. McGinty lived next door and he had always attended him before, and he was friendly. In fact, he uses our garage right now; they haven't a driveway. And my children and his children have been back and forth visiting when they went to school. And I was surprised. So when I come down she said, "I didn't know who to call, Mr. Koch, but Dr. Cottrell belongs to the Commandery with him and he is an old crony. I don't think there is much wrong with your father. Mrs. Doerr said he was a good doctor friend of theirs, so I called him in." So Cottrell was there. I said, "Well, what is the matter, Doctor?" He said, "Well, I don't know, but," he says, "I want you to get a pulley and have a rope hung up on the wall there for your father, have his leg pulled up." And so I said I would get a carpenter. And I had this pulley arranged. So father seemed all right. He just said his leg bothered him. He was in bed. So I came down the next day, and he wouldn't use this thing; never did use it. So I kept coming down every day, and Mrs. Compton said to me, [193] "I don't think there is anything that this doctor has to do to keep coming every day." I said, "Let him come, my father thinks he is visiting here, it is kind of a Masonic call, maybe it will do him some good." "Well,

(Testimony of George Adolph Koch.)

if you want it, all right," she says, "he is making a call every day and he isn't doing anything for him, he isn't giving him any medicine and you are paying him for it." I said, "Oh, it doesn't make any difference, maybe it will satisfy him." So in about a couple of weeks my father says, "Did you tell Cottrell to come here every day?" And I said, "Well, no, I didn't tell him to come every day, I told him to visit." Well, he said, "You know he is charging me \$3.00 a day, and," he says, "he has run up a bill to \$90.00, so I fired him today and wrote a check out."

So that is the extent of Cottrell's visits. And what I think of Cottrell is very little, as far as a doctor goes. I had a cinder in my eye and I went up to see him, and I am sorry I ever went to him, because I got about half the sight of my left eye today on account of him taking the cinder out of my eye. That is why we called in McGinty when my father got sick the second time, because I have no confidence in the man.

Mr. Murray: If your Honor please, I ask that the comments about Dr. Cottrell be stricken as not responsive to the question, and irrelevant and immaterial in this case.

The Judge: Overruled. [194]

By Mr. Chargin:

Q. What was your father's health after that time, after that illness? Was he up and around again?

A. Well, so far as his health was concerned, all my father knew was business. He never knew how to play, and he never let me play, and that is all I know. And all we talked about was business. Out-

(Testimony of George Adolph Koch.)

side of this limp, and coming down to see him, he ate well and we would have a cocktail together, and he talked business until the morning he died. And he gave me orders to take him out in an ambulance. I never have seen him any different than I have seen him since by boyhood days. It was all business and work, and that is all I ever knew of him until the day they took him away to the hospital.

Mr. Chargin: No further questions.

Mr. Murray: I just have a question or two, Mr. Koch.

Cross-Examination

By Mr. Murray:

Q. I understood you to say a while ago that you had a joint account with your father. What kind of a joint account or accounts did you have with him, please?

A. Well, I had a joint commercial account with him, but not in the savings account, or any of his others—not in his Building & Loan account. We made that for convenience.

Q. That was a checking account, wasn't it? [195]

A. A checking account.

Q. And either could draw on it?

A. That's right.

Q. Well now, did you not have a joint safety deposit box with him, also, at one time?

A. Well, he gave me his key years ago, but I never took the privilege of ever opening it until he wanted me to go down with him at the time we took these se-

(Testimony of George Adolph Koch.)

curities out for Ralph and myself; that is the first time I ever was in the box with my father.

Q. Now, is it not true that some of the securities or all of them were endorsed in blank by your father?

A. My father always kept all of his securities at all times that way; as soon as he bought any securities he always endorsed them.

Q. Endorsed them in blank?

A. Always. What do you mean "in blank"? His name?

Q. Yes.

A. That's right. He signed every security the same as it was made out to him, in his name.

Q. So that whenever he would tell you to go to the box, or on any occasion you would go to the box because you had the key, you could negotiate the whole thing without any need of his signature or anything, anything further, that is right, isn't it? [196]

A. Well, I never went to the box except at the time that we took out these first two lots in December of '38; that is the first time I ever went to the box with my father. He always told me that he kept his securities endorsed, but I had never seen them or been in his box, never seen what he had, didn't know what he was worth.

Q. Well, on the occasion when you did go to the box to get the securities, you could handle the whole thing yourself, isn't that right, you didn't need any further signature from your father?

A. I wouldn't say that, because I don't know. I don't presume that any stock company—in fact, I

(Testimony of George Adolph Koch.)

know it, being in the stock business I will say this, you couldn't take, even with an endorsed signature, and go to any stock house without a guarantee, and get the instrument negotiated. So it wouldn't do any good.

Q. Well, at any rate, they were all signed?

A. They were all signed.

Q. By your father. He didn't have to sign them again?

A. That's right.

Q. That's right. In the joint checking account, commercial account, how did the money get in there when it was placed in there, who put it in?

A. Oh, he always put it in.

Q. He always put the money in. [197]

Q. Do you *know much* your father had other than what is the subject of this question on this trial, how much estate he left at the time of his death?

A. No. The records show that, around one hundred and forty or fifty-thousand-dollar estate. Mr. Johnston has got it right there, I think. I have got the papers home, I haven't got them with me.

[198]

PETITIONER'S AND RESPONDENT'S
JOINT EXHIBIT A-1

[Stamped]: Received, Nov. 7, 1939 Estate Tax
Division, San Francisco.

Form 706

Treasury Department
Internal Revenue Service
Revised September 1936

(Space for use of collector)
Received

[Stamped]: Received with remittance, Oct. 19,
1939. Collector of Internal Revenue, First District
California.

ESTATE TAX RETURN

(To be filed in duplicate)

Decedent's name—Adolph J. Koch
Date of death—June 29, 1939
Residence at time of death—San Jose, California
Citizenship at time of death—United States

GENERAL INSTRUCTIONS

Current Estate Tax Laws

Current Federal estate taxation consists of, first, the estate tax imposed by the Revenue Act of 1926, as amended, and, second, the additional estate tax imposed by the Revenue Act of 1932, as amended.

Basic act.—The Revenue Act of 1926, enacted 10:25 a. m., eastern standard time, February 26, 1926, imposes an estate tax against which credit

(Petitioner's and Respondent's Exhibit A-1—
Continued)

not in excess of 80 percent of such tax is allowable for inheritance, estate, legacy, or succession taxes paid a State, Territory, or the District of Columbia of the United States. Under this act, as amended, a specific exemption of \$100,000 is authorized for the estate of a resident or citizen of the United States (or a resident only, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934). Such basic provisions as those relating to the composition of the gross estate are set forth in this act and are not repeated in the act which imposes the additional estate tax.

Act imposing additional estate tax.—The Revenue Act of 1932, enacted 5 p. m., eastern standard time, June 6, 1932, imposes an additional estate tax against which no credit is allowable for inheritance, estate, legacy, or succession taxes. Under this act, as amended, a specific exemption of \$40,000 is authorized for the estate of a resident or citizen of the United States who died on or after August 31, 1935. If the decedent died prior to August 31, 1935, a specific exemption of \$50,000 is authorized for the estate of a resident or citizen of the United States (or a resident only, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934.)

Amendatory acts.—The Revenue Act of 1934, enacted 11:40 a. m., eastern standard time, May 10, 1934, places the estates of non-resident citizens of

(Petitioner's and Respondent's Exhibit A-1—
Continued)

the United States in the same category with estates of residents by making the specific exemptions applicable and by including for tax property situated outside the United States. This act also increases the rates of the additional estate tax imposed by the Revenue Act of 1932 (effective for estates of decedents dying on or after May 11, 1934).

The Revenue Act of 1935, enacted on August 30, 1935, increases the rates of the additional estate tax imposed by the Revenue Act of 1932, as previously amended, reduces the specific exemption to \$40,000, and provides an optional valuation whereby an estate that suffers a shrinkage in value subsequent to the decedent's death may be relieved of an undue tax burden that would result if such estate were valued as of the date of the decedent's death.

Other amendatory acts which effected changes in certain details are: The Revenue Act of 1928, May 29, 1928; Public Resolution No. 131, Seventy-first Congress, March 3, 1931; and the Revenue Act of 1936, June 22, 1936.

Return Required for Estate of Resident or Citizen

A return on this form must be filed for the estate of every resident or citizen of the United States who died on or after August 31, 1935, and whose gross estate as defined by the statute exceeded \$40,000 in value at the date of death. The return is required for the estate of every resident or citizen of the United States who died prior to August 31, 1935, and subsequent to 11:40 a. m., eastern stan-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

dard time, May 10, 1934, and whose gross estate exceeded \$50,000 in value at the date of death. For estates of decedents who died prior to the enactment of the Revenue Act of 1934, see articles 63 and 70 of Regulations No. 80.

The value of the gross estate at the date of the decedent's death governs the liability for the filing of the return regardless of any valuation as of a subsequent time that may be adopted by the executor under the provisions of subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935, since such option may only be exercised by a statement on the return.

Return Required for Estate of Nonresident Alien

A return on this form is required for the estate of every nonresident alien of the United States (or nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) any part of whose gross estate was situated, within the meaning of the statute, in the United States. No specific exemption is authorized in the case of a nonresident alien (or non-resident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934).

Time and Place for Filing Return

The return is due 15 months after the date of death if the decedent died on or after August 31, 1935, and 1 year after the date of death if the decedent died before August 31, 1935. The return

(Petitioner's and Respondent's Exhibit A-1—
Continued)

for the estate of a resident decedent must be filed with the collector in whose district the decedent had his domicile at the time of death. The return for the estate of a nonresident decedent must be filed with the collector in whose district the gross estate in the United States was situated; or, if the gross estate in the United States was situated in more than one district, or, if in the case of a nonresident citizen who died after the enactment of the Revenue Act of 1934, no part of the gross estate was situated in the United States, it must be filed with the Collector for the Second District of New York, or with such collector as the Commissioner may designate.

Payment of Tax

The tax is due 15 months after the date of death if the decedent died on or after August 31, 1935, or 1 year after the date of death if the decedent died before August 31, 1935, and must be paid within such period unless an extension of time for payment thereof has been granted by the Commissioner. Check or money order in payment of the tax should be made payable to "Collector of Internal Revenue at.....", naming city and State in which is located the office of the collector with whom the return is filed.

Gross Estate

In addition to property passing under a will or the intestate laws, the gross estate for the purpose of the estate tax includes, as more specifically ex-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

plained hereinafter, certain transfers made during the decedent's life without an adequate and full consideration in money or money's worth, joint estates with right of survivorship, tenancies by the entirety, life insurance even though payable to beneficiaries other than the estate, property over which the decedent exercised a general power of appointment, and dower, curtesy or statutory estate in lieu thereof, of the surviving spouse.

Property Situated in the United States

In the case of the estate of a nonresident alien (or of a nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) the statute reaches only property situated in the United States at the time of death, except that property transferred during the decedent's life and described under Schedule G is included if such property was situated in the United States either at the time of the transfer or at the time of death. The term "United States", when used in a geographical sense, includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia. Real estate and tangible personal property are situated in the United States if physically therein. Certificates of stock, bonds, bills, notes, and other written evidences of intangible property which are treated as being the property itself, are property situated in the United States if physically situated therein. Except certain insurance and bank deposits hereinafter de-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

scribed, intangible personal property has a situs in the United States if consisting of a property right issuing from or enforceable against a corporation (public or private) organized in the United States or a person who is a resident of the United States, such as corporate stock issued by such a corporation, or a simple debt, bond, note, or other chose in action for which such a corporation or individual is liable. Under an express provision of the statute, proceeds of insurance upon the life of a nonresident alien (nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) and bank deposits of such decedent, who was not engaged in business in the United States at the time of his death, are not regarded as property in the United States.

Supplemental Documents

If the decedent was a resident and died testate, two copies of the will, one of them certified, must be filed.

If the decedent was a nonresident citizen who died after the enactment of the Revenue Act of 1934, the following documents must be filed with the return:

(1) A copy of the inventory of property and the schedule of liabilities, claims against the estate and expenses of administration filed with the foreign court of probate jurisdiction, certified by a proper official of such court.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

(2) A copy of the return filed under the foreign inheritance, estate, legacy, or succession tax act, certified by a proper official of the foreign tax department, if the estate is subject to such a foreign tax.

(3) If the decedent died testate, a certified copy of the will.

If the decedent was a nonresident alien (or a nonresident, regardless of citizenship, if he died prior to the enactment of the Revenue Act of 1934) the following documents must filed:

(1) If deductions are claimed, certified copies of the inventory and schedule or a certified copy of the return, as described in the preceding subparagraphs (1) and (2).

(2) If the decedent died testate, a certified copy of the will.

Other supplemental documents may be required as hereinafter explained under the instructions for the several schedules.

Execution of Return

This form consists of the cover sheets and 19 inside sheets numbered in consecutive order. A complete set should be used for every copy of the return required. For convenience in typing carbon copies the sets as issued may be readily separated and the corresponding sheets matched. When completed, each copy of the return to be filed must be permanently fastened together with all sheets in proper order. Any suitable type of paper fastener

(Petitioner's and Respondent's Exhibit A-1—
Continued)

may be utilized for this purpose. Ordinary wire staples are recommended for the return of average size. The return must be filed in duplicate. All sheets provided, numbered I to XXI, must be included.

Write only on one side of each sheet of paper. If there is not sufficient space for all entries under any of the printed schedules, use additional sheets of the same size, and insert in the proper order in the return. All information required, as indicated under "General Information", must be supplied in the spaces provided. The questions asked under each schedule must be specifically answered, and if the decedent owned no property of any class specified for the schedule, the word "None" should be written across the schedule.

The gross estate must be set forth under the appropriate Schedules A to I. The deductions, except amounts claimed for the specific exemptions and property previously taxed, should be shown under the appropriate Schedules J to N. The amounts deducted for the specific exemptions and property previously taxed should be shown under Schedules P and Q, or under Schedule R. If the gross estate of a resident or citizen (resident only, if the decedent died prior to the enactment of the Revenue Act of 1934) exceeds \$100,000 the net estate for the tax imposed by the Revenue Act of 1926, as amended, should be computed under Schedule P. The net estate for the additional tax im-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

posed by the Revenue Act of 1932, as amended, on the estate of a resident or citizen (resident only, if the decedent died prior to the enactment of the Revenue Act of 1934) should be computed under Schedule Q. The net estate for a nonresident alien (nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) should be computed under Schedule R.

For every item of principal, any amount of income accrued thereon at the date of the decedent's death must be separately entered under the column headed, "Value at date of death"; and, if the optional valuation is adopted, for every item of principal, any amount of income accrued thereon at the subsequent date as of which such item of principal is valued, and any amount of income collected thereon between the date of death and such subsequent date, must be separately entered under the column headed "Value under option."

The items should be numbered under every schedule and a separate enumeration should be used for each schedule. The total for each schedule should be shown at the bottom of the schedule. The totals should not be carried forward from one schedule to another, but the total or totals for each schedule should be entered under the Recapitulation, Schedule O.

The information indicated by the columns headed "subsequent valuation date" and "Value under op-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

tion" should not be shown unless the executor adopts the optional valuation authorized by subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935. If such optional valuation is not adopted the space in the columns headed "Subsequent valuation date" and "Value under option" may be utilized for descriptive matter, as indicated in the examples shown under the instructions for Schedules A and B. Similar information should be omitted in the space provided therefor under the Recapitulation, Schedule O, if the optional valuation is not adopted.

The computation of the tax must be shown in detail as indicated on sheet XX. If the executor determines no liability for tax, the word "None" should be shown at item 11 under "Computation of Tax."

The filing of this form will not be considered the filing of a complete return as required by the statute and the regulations issued pursuant thereto unless all the information as indicated herein is set forth.

If there is more than one executor or administrator, all must sign and swear to (or affirm) the return. The affidavit may be sworn to before any person authorized to administer oaths except the attorney or attorneys representing the taxpayer. If the officer has an official seal, such seal must be affixed.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

If there is no executor or administrator appointed, qualified, and acting in the United States, every person in actual or constructive possession of any property of the decedent is constituted by the statute an executor for the purposes of the tax (section 300 (a) of the Revenue Act of 1926), and is liable for the filing of the return. If two or more persons are liable for the filing of the return, it is preferable for all to join in the filing of one complete return, but if they are unable to join in making one complete return, each is required to file a return disclosing all the information he has in the case, including the name of every person holding an interest in the property and a full description of such property. If the appointed, qualified, and acting executor or administrator is unable to make a complete return, the statute requires that every person holding an interest in the property shall, upon notice from the collector, make a return as to such interest.

The person or persons that file the return must, in every case, execute the first affidavit on sheet XX. If the return is prepared by an attorney or agent for the person or persons filing this return, the second affidavit on sheet XX must also be executed, and executed only by such attorney or agent.

If the taxpayer desires to be represented by an attorney, by correspondence or otherwise, a power of attorney must be filed. For this purpose, Form 711, obtainable from any collector, may be executed.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Valuation

Unless the executor elects otherwise at the time the return is filed, all property included in the gross estate must be valued as of the date of the decedent's death. The date of the decedent's death is the only valuation date permitted for the estate of a decedent who died prior to August 31, 1935.

Optional Valuation

If the executor elects to adopt the valuation authorized by subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935, such election must be expressly indicated in the space provided under "General Information." The election is available only at the time the return is filed, and cannot thereafter be rescinded.

Section 202 (Revenue Act of 1935.) Estate Tax—Valuation.—

(a) Section 302 of the Revenue Act of 1926, as amended, is amended by adding a new subdivision as follows:

"(j) If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death

(Petitioner's and Respondent's Exhibit A-1—

Continued)

and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, which ever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303 (a) (3) or section 303 (b) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to

(Petitioner's and Respondent's Exhibit A-1—
Continued)

mere lapse of time or the occurrence or nonoccurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period.)”

(b) The amendment made by this section shall be effective only with respect to transfers of estates of decedents dying after the date of the enactment of this Act.

In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election duly made upon this return, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within 1 year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date 1 year after the date of the decedent's death;

(Petitioner's and Respondent's Exhibit A-1—
Continued)

(3) Any property, interest, or estate which is “affected by mere lapse of time”, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date 1 year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever first occurs.

Property “distributed” is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. (Subdivisions (c) and (d) pertain to certain transfers during the decedent's life and subdivision (f) pertains to property passing under a general power of appointment.) Distribution may be effected by the entry of the order or decree of distribution, or if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which the subdivision refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it

(Petitioner's and Respondent's Exhibit A-1—
Continued)

had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee, or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms, "distributed", "sold", "exchanged", "or otherwise disposed of", comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of".

The property to be valued as of 1 year after the date of decedent's death, or as of that date, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as the subdivision treats of the two separately, it will be

(Petitioner's and Respondent's Exhibit A-1—

Continued)

necessary in every case first to determine what property constituted the gross estate at decedent's death. Other subdivisions of section 302, as amended, rather than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Subdivision (j) is subject to a like construction when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case

(Petitioner's and Respondent's Exhibit A-1—
Continued)

of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value

(Petitioner's and Respondent's Exhibit A-1—
Continued)

of the stock. But a dividend declared prior to the valuation date of the stock but payable subsequent thereto will not be so reflected if "ex dividend" on valuation date of the stock, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302 as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of another other than the decedent, remainders, reversions, and other like properties, interests, or estates. The phrase, "affected by mere lapse of time", has no reference to obligations for the payment of money, whether or not interest-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest,

(Petitioner's and Respondent's Exhibit A-1—
Continued)

or estate so affected is, as prescribed in subdivision (j), the date of decedent's death, but with an adjustment to be made of the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or subtracts from the value at death any difference between that value and the value as of the date 1 year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. For further information and examples relative to the valuation of properties, interests, or estates which are affected by mere lapse of time, see the regulations issued pursuant to subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935.

Deductions authorized under section 303 are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property

(Petitioner's and Respondent's Exhibit A-1—

Continued)

transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 303 (a) (3) or in section 303 (b) (3), is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value 1 year after such death, or at the date of its sale or exchange. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or nonoccurrence of a contingency.

The election is available to the executor only at the time the return is filed, and only if the return is filed within 15 months from the decedent's death or within the period of an extension of time for filing granted under the provisions of articles 68 or 69 of Regulations 80. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if made, cannot be rescinded.

In every case where the election is exercised, the return must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of such property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined as hereinbefore ex-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

plained and in accordance with the regulations issued pursuant to subdivision (j). The amount of any income accrued at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is valued, and the amount of any income accrued thereon at such subsequent valuation date, shall be separately shown. The foregoing information must be shown under the appropriate columns of each schedule. Under the column headed "Description" a brief statement for each item must be shown explaining the status or transfer governing the subsequent valuation date, such as, "Not disposed of within year following death", "Distributed", "Sold", "Bond paid on maturity", etc. Under this same heading a description of each item of principal and income must be entered separately. Under the heading "Subsequent valuation date", a date for each separate entry of principal and income must be shown. Under the heading "Value under option" the amount of the principal, the amount of income accrued to the subsequent valuation date as of which the principal is valued, and the amount of each payment of any income collected with respect to such principal between the date of the decedent's death and such subsequent valuation date must be separately shown. In the case of any interest, or estate the value of which is affected by mere lapse of time

(Petitioner's and Respondent's Exhibit A-1—
Continued)

such as patents, leaseholds, estates pur autre vie, or remainder interests the value shown under the heading "Value under option" must be the adjusted value, i. e., the value as of the date of death with an adjustment reflecting any difference in its value as of the later date not due to mere lapse of time. Under the heading, "Value at date of death" the amount of the principal and the amount of income accrued to the date of death must be entered separately.

For examples illustrating the entry of the information required under the schedules, see the reverse of sheets IV and V. While the examples there shown pertain to Schedules A and B, the information required under the other schedules should be set forth in a similar manner.

All the information indicated on this form must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period after the decedent's death must be supported by evidence. If the court issues an order of distribution during that period a certified copy of the order must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

Penalties

For penalties for failure to file return when due, keep records, and supply information, or for the preparation or presentation or the aiding or assist-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

ing in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, see articles 90 to 94, inclusive, of Regulations 80.

General Information

Decedent's name—Adolph J. Koch

Date of death—June 29, 1939

Residence (domicile) at date of death—San Jose, California

Year in which last domicile was established—1872

Citizenship at date of death—United States

Place of death—San Jose, California

Cause of death and length of last illness—extra peritoneal hemorrhage due to rupture of left hypogastric artery, last illness 24 hrs.

Names and addresses of decedent's physicians:

John H. Shepard, Medico-Dental Bldg., San Jose, Calif.

Arthur T. McGinty, 279 S. Thrid St., San Jose, Calif.

Dr. Porter—2 yrs. before dth.

If decedent was confined in a hospital during his last illness, give name and address of hospital—San Jose Hospital, San Jose, California

[Written in pencil]: 84 yrs. 3 mos.

Date of birth—March 24, 1855

Place of birth—Bavaria, Germany

Business or occupation—Retired

Business address—

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Married, single, separated, widowed, or divorced
at date of death—widowed

Number of children—One surviving

Heirs, Next of Kin, Devisees, and Legatees
(If more than five, only the names of the five prin-
cipal ones are required)

Name	Relationship	Address
George A. Koch	Son	144 Funston Ave., San Francisco, Calif.
Ralph J. Swickard	Grandson	San Jose, California

Did decedent die testate?—Yes

Were letters testamentary or of administration
granted for this estate?—Letters Testamentary

Date granted—August 2, 1939

Name and location of court—Superior Court of
the State of California, in and for the County of
Santa Clara, at San Jose, California

To whom granted? (Explain if different from
the person or persons filing return.)—George A.
Koch.

Did the decedent at date of death own property
in any State or country other than that of his last
domicile?—No

Place of ancillary probate proceedings, if any—

Name and address of ancillary administrator or
executor—

Did the decedent at the time of his death have a
safe deposit box held either alone or in the joint
names of himself and another?—Yes

(Petitioner's and Respondent's Exhibit A-1—
Continued)

If so, state location—First National Bank of San Jose, San Jose, California

If held jointly, give the name of the joint depositor and his relationship to the decedent—George A. Koch, son

If the decedent had a safe deposit box at the time of his death indicate under what schedules in this return the contents are listed—Schedule C

If any of the contents of the safe deposit box are omitted from the schedules, explain why—None

Did the undersigned person or persons filing return make diligent and careful search for property of every kind left by the decedent?—Yes

Did the same undersigned make diligent and careful search for information as to any transfers of the value of \$5,000 or more made by the decedent during his lifetime without an adequate and full consideration in money or money's worth?—Yes

Name and address of attorney representing estate, if any—Faber L. Johnston, 1st Nat'l Bank Bldg., San Jose, California

Optional Valuation

Does the executor elect to have the property included in the gross estate of this decedent valued in accordance with the method authorized by subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935? (Answer "Yes" or "No.")—No

(This option is available only at the time the

(Petitioner's and Respondent's Exhibit A-1—
Continued)

return is filed, and cannot thereafter be changed. Unless the answer to this question is "Yes", the tax must be computed in accordance with values as of the date of the decedent's death.)

Estate of Adolph J. Koch

GROSS ESTATE

Schedule A

REAL ESTATE

(See instructions on reverse of this sheet)

Did the decedent, at the time of his death, own any real estate in the United States? (Answer "Yes" or "No") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
----------	-------------	---------------------------	--------------------	------------------------

[In pencil]: J. L. Harkris

\$ \$

None

Total (also enter under the Re-
capitulation, Schedule O)\$..... \$.....

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule A

Real Estate

Real estate should be so described and identified that upon investigation by an Internal Revenue officer it may be readily located for inspection and valuation. For each parcel of real estate there

(Petitioner's and Respondent's Exhibit A-1—
Continued)

should be given the area and, if the parcel is improved, a short statement of the character of the improvements. For city or town property state street and number, ward, subdivision, block and lot, etc. For rural property state township, range, landmarks, etc.

If any item of real estate is subject to a mortgage, the unpaid balance of the mortgage should be shown under "Description." The full value of the property and not the equity must be extended in the value column. The amount of the mortgage should be deducted under Schedule L of this return.

Real property which the decedent has contracted to purchase should be listed in this schedule. The full value of the property and not the equity must be extended in the value column. The unpaid portion of the purchase price should be deducted under Schedule L of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof or on account of homestead or other exemptions, should be made in returning the value of the real estate.

The basis for the returned values should be stated. If based upon appraisal a copy of such appraisal should either be attached to the return or retained in your files subject to inspection.

For further instructions see articles 10 to 13, inclusive, Regulations No. 80.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

EXAMPLES SHOWING USE OF SCHEDULE

Example where the optional valuation is not adopted;
date of death, December 1, 1935

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	House and lot, 1921 William Street NW., Washington, D. C., (lot 6, square 481). Property under lease. Value based on appraisal, copy of which is attached			\$ 36,000.00
	Rent accrued but unpaid on Item 1.....			300.00
2.	House and lot, 304 Jefferson Street, Alexandria, Va. (lot 18, square 40). Property under lease. Value based on appraisal, copy of which is attached			16,000.00
	Rent accrued but unpaid on Item 2.....			133.33

Example where the optional valuation is adopted;
date of death, December 1, 1935

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	House and lot, 1921 William Street NW., Washington, D. C., (lot 6, square 481). property under lease. Values based on appraisal, copy of which is attached. Not disposed of within year following death	12/1/36	\$ 30,000.00	\$ 36,000.00
	Rent accrued but unpaid on Item 1.....	12/1/36	1,200.00	300.00
	Rent collected on Item 1	1/1/36	600.00	.....
	Rent collected on Item 1	7/1/36	1,800.00	.....
2.	House and lot, 304 Jefferson Street, Alexandria, Va., (lot 18,			

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Examples Showing Use of Schedule—(Continued)

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	square 40). Lease expired June 30, 1936. Values based on appraisal, copy of which is attached, Property exchanged for farm on August 1, 1936.....	8/1/36	14,000.00	16,000.00
	Rent accrued but unpaid on Item 2.....	8/1/36	133.00	.....
	Rent collected on Item 2	1/1/36	533.33	.....
	Rent collected on Item 2	4/1/36	400.00	.....

In this example, item 1, \$36,000 represents the value of the house and lot on December 1, 1935, the date of the decedent's death, and \$30,000 represents its value on December 1, 1936, 1 year after the decedent's death. It will be noted that the amount of \$300 entered in the column headed "Value at date of death" is the amount of rent accrued but unpaid under the lease at the date of the decedent's death, and that the amount of \$1,200 entered in the column headed "Value under option" is the amount of rent accrued but unpaid at the subsequent valuation date (December 1, 1936) as of which the real property is valued under the option. The amounts, \$600 and \$1,800, entered in the column headed "Value under option" represent rents collected (on January 1, 1936, and on July 1, 1936) between the date of decedent's

(Petitioner's and Respondent's Exhibit A-1—
Continued)

death and the subsequent valuation date (December 1, 1936) as of which the real property is valued under the option.

Schedule B

Stocks and Bonds

(See instructions on reverse of this sheet)

(1) Did the decedent, if a resident or citizen of the United States (or a resident, regardless of citizenship, if death occurred prior to the enactment of the Revenue Act of 1934) own any stocks or bonds, regardless of situs, at the time of his death? (Answer "Yes" or "No.")—Yes

(2) Did the decedent, if a nonresident alien of the United States (or a nonresident, regardless of citizenship, if death occurred prior to the enactment of the Revenue Act of 1934) own, at the time of his death, any stocks or bonds situated in the United States as explained in the instructions? (Answer "Yes" or "No.")—

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
		.10 @ .15 - S.F. Ex. d/d		
	1000 shares of Occidental Petroleum Corporation, Cert. #18610 for 500 shares and #18609 for 500 shares		\$	\$ 100.00

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule B—(Continued)

Item No.	Description	Subsequent valuation date	Value under option	Value at date at death
2	shs. Masonic Hall stock ? (Par. 10) Dec. turned it over to Helwig before d/d, and then turned back to San Jose Abstract Co. for dec. Worth \$15.00 per share.			

Total (also enter under the Recapitulation,
Schedule O)\$..... \$ 100.00

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule B

Stocks and Bonds

Description.—Description of stocks should indicate number of shares, whether common or preferred, issue, par value, price per share, exact name of corporation, and, if unlisted, the location of the principal business office and State in which incorporated and the date of incorporation. If listed, state principal exchange upon which sold. Description of bonds should include quantity and denomination, name of obligor, kind of bond, date of maturity, interest rate, and interest-due dates. State the exchange upon which listed, or if unlisted, the principal business office of the company.

Valuation.—Listed stocks and bonds should be valued at the mean between the highest and lowest selling prices on the valuation date, or if there were no sales on such date, then at the mean between the highest and lowest sales on the nearest

(Petitioner's and Respondent's Exhibit A-1—
Continued)

date thereto, if within a reasonable period. If the valuation date is on a Sunday or a holiday, the quotations of the nearest previous day should be used. If listed on several exchanges, quotations of the principal exchange should be employed. Unlisted securities which are dealt in actively by brokers or have an active market should be valued at the sale price as of the valuation date or the nearest date thereto, if within a reasonable period either before or after such date. Only sales in the normal course of business should be employed. If sale prices are not available and the stock is quoted on a bid and asked basis, the mean of the bid and asked prices on the valuation date, or the nearest date thereto, where not quoted as of such date, should be taken.

Inactive stock and stock in close corporations should be valued on the basis of the company's net worth, earning and dividend paying capacity, and all relevant factors bearing on the value of the stock. Complete financial and other data upon which the estate bases its valuation should be submitted in duplicate with the return, including balance sheets (particularly the one nearest to the valuation date), and statements of the net earnings or operating results and dividends paid for each of the 5 years immediately preceding the valuation date.

Securities returned as of no value, nominal value or obsolete, should be listed last, and the address

(Petitioner's and Respondent's Exhibit A-1—
Continued)

of the company and the State and date of the incorporation should be stated. Correspondence or statements used as the basis for return at no value should be retained for inspection.

Interest and dividends.—Interest and dividends must be shown separately as explained in the general instructions under "Execution of Return."

Estate of nonresident alien.—In the case of an estate of a nonresident alien of the United States (or an estate of a nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) stocks or bonds of either of the following two classes must be included hereunder: (1) Stocks or bonds of corporations organized in the United States, regardless of the situs of the certificates; and (2) stocks or bonds of corporations, whether domestic or foreign, if the stock certificates were situated in the United States at the time of the decedent's death. For example, a share of stock of a corporation organized in the United States must be included for tax in the estate of a nonresident alien even though the stock certificate was in England; and a share of stock of a corporation organized in England must be included in his estate if the stock certificate was in the United States at the time of death.

Further instructions.—For further instructions, see articles 11, 12, 13, and 50 of Regulations No. 80, and the regulations issued pursuant to the optional valuation provision.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

EXAMPLE SHOWING USE OF SCHEDULE

Example where the optional valuation is not adopted;
date of death, Decemebr 1, 1935

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	Sixty \$1,000 Pennsylvania Railroad Co. first mortgage 4-percent, 20-year bonds, due 1945. Interest payable January, April, July, and October. New York Exchange at 100.....			\$ 60,000
	Interest accrued on Item 1			400
2.	Five hundred shares Public Service Corporation, common, par \$100, at 110, ex dividend, New York Exchange			55,000
	Dividend on Item 2 of \$2 per share paid on December 5, 1935, to holders of record on November 20, 1935			1,000
3.	One hundred shares Brown Investment Corporation, Red Bank, N. J., unlisted, common, par \$100, at 1500, per Exhibit A. Incorporated in New Jersey			150,000

Example where the optional valuation is adopted;
date of death, December 1, 1935.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	Sixty \$1,000 Pennsylvania Railroad Co. first mortgage 4-percent, 20-year bonds, due 1945. Interest payable January, April, July, and October. New York Exchange. At 100 on date of death. At 99 on June 1, 1936, date of sale by executor....	6/1/36	\$ 59,400	\$ 60,000

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Examples Showing Use of Schedule—(Continued)

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	Interest accrued on			
	Item 1	6/1/36	400	400
	Interest collected on			
	Item 1	1/1/36	600	.....
	Interest collected on			
	Item 1	4/1/36	600	.....
2.	Five hundred shares Public Service Corporation, common, par \$100. New York Exchange. At 110, ex dividend, on date of death. At 74 on December 1, 1936. Not disposed of within year following death..	12/1/36	37,000	55,000
	Dividend on Item 2 of \$2 per share paid on December 5, 1935, to holders of record on November 20, 1935.....	12/5/35	1,000	1,000
	Dividend on Item 2 of \$1 per share paid on March 5, 1936. No further dividends declared	3/5/36	500	.....
3.	One hundred shares Brown Investment Corporation, Red Bank, N. J., unlisted, common, par \$100. Incorporated in New Jersey. At 1500 on date of death, per Exhibit A. At 750 on December 1, 1936, per			

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Examples Showing Use of Schedule—(Continued)

Item No.	Description	Subsequent valuation date	Value under option	Value at date at death
	Exhibit B. Not disposed of within year following death	12/1/36	75,000	150,000
	Dividend on Item 3 of \$750 cash per share paid August 10, 1936	8/10/36	75,000	.....

Schedule C

MORTGAGES, NOTES, AND CASH

(See instructions on reverse of this sheet)

Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No") Yes.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
1.	Cash		\$	\$ 513.52
	Promissory note for \$42500 dated Nov. 15, 1936 executed by George B. Campbell and Annie Campbell, to A. J. Koch, payable 3 years after date with interest at 5% payable monthly, Int. paid to June 15, 1939. Secured by deed of trust dated Nov. 15, 1936 executed by George B. Campbell and Annie E. Campbell his wife, to San Jose Abstract & Title Insurance Co. as trustee, and A. J. Koch, beneficiary, recorded Nov. 16, 1936 in Vol. 799 of Official Records, page 50, Santa Clara County Records			42,500.00
	Interest to date of death			88.52
2.	Promissory note for \$15000.00 dated May 1, 1935, executed by Auzerai Estate Company, a corporation, to A. J. Koch, payable 3 years after date with interest at 6% per annum payable monthly. Int. paid to June 1, 1939. Also promissory note for \$1000 dated May 7, 1935 executed by Auzerai Estate Company, a corpora-			

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule C—(Continued)

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	tion to A. J. Koch, payable Apr. 30, 1938 with interest at 6% per annum payable monthly. Int. paid to June 1, 1939. Both secured by deed of trust dated May 1, 1935 executed by Auzerai's Estate Company, a corporation, to San Jose Abstract & Title Insurance Co. as trustee and A. J. Koch beneficiary, recorded May 4, 1935 in Vol. 730 of Official Records, page 172, Santa Clara County Records			16,000.00
	Interest to date of death			77.33
3.	Promissory note for \$10000.00 dated Sept. 1, 1936 executed by Foundation Holding Corporation, a corporation, to A. J. Koch payable 3 years after date, with interest at 5% per annum payable monthly. Int. paid to June 1, 1939. Secured by deed of trust dated Sept. 1, 1936 executed by Foundation Holding Corp., a corporation, to San Jose Abstract & Title Insurance Co. as trustee, A. J. Koch beneficiary, recorded Sept. 2, 1936 in Vol. 789 of Official Records, page 125, Santa Clara County Records.....			10,000.00
	Interest to date of death			40.28
4.	Promissory note for \$27000.00 dated Nov. 10, 1935 executed by Fred Hanchett, Vivian Hanchett, J. R. Conner and Sue W. Conner to A. J. Koch, payable 5 years after date with interest at 6% per annum payable monthly. Int. paid to June 10, 1939.			

Total (also enter under the Re-

capitulation, Schedule O)\$ Ford \$ 69,219.65

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule C—(Continued)

Mortgages, Notes and Cash

Item No.	Description	Subsequent val- uation date	Value under option	Value at date of death
			Ford.	\$ 69,219.65
	Secured by deed of trust dated Nov. 10, 1935 executed by Fred Hanchett and Vivian Hanchett, his wife, and J. R. Conner and Sue W. Conner, his wife, to San Jose Abstract & Title Insurance Co., trustee, A. J. Koch as beneficiary, recorded Nov. 20, 1935 in Vol. 747 of Official Records, page 476, Santa Clara County Records			27,000.00
	Interest to date of death			85.51

Item No.	Description	Subsequent val- uation date	Value under option	Value at date of death
5.	Promissory note for \$2500.00 dated Nov. 28, 1938, executed by Paul S. Williams and Phyllis M. Williams to Adolph J. Koch, payable on or before one year, interest at 5% per annum, payable monthly. Int. paid to June 28, 1939. Secured by deed of trust executed by Paul S. Williams and Phyllis M. Williams, his wife, to San Jose Abstract & Title Insurance Co., as trustee, and Adolph J. Koch, beieficiary, recorded Nov. 28, 1938 in Vol. 903 of Official Records, page 443, Santa Clara County Records			2,500.00
	Interest to date of death.....			.70

6. Promissory note for \$6000.00 dated Apr. 3, 1935 executed by John H. Drew and Charlotte F. Drew to A. J. Koch, payable on or before 2 years after date, interest at 6% per annum payable monthly, \$4000 paid on principal, balance unpaid \$2000, interest paid to June 3, 1939. Secured by deed of trust dated Apr. 3, 1935 executed by John H. Drew and Charlotte F. Drew, his wife, to San Jose Abstract & Title Insurance Co. as trustee, A. J. Koch as beneficiary

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule C—(Continued)

recorded Apr. 4, 1935 in Vol. 724 of Official Records, page 324, Santa Clara County Records	2,000.00
Interest to date of death.....	9.00
7. Promissory note for \$15000.00 dated Dec. 31, 1938 executed by Nelly LeFranc Horney and Celine H. Delmas to A. J. Koch, payable 3 years after date, interest at 6% per annum payable monthly. Int. paid to May 1, 1939. Secured by deed of trust dated Dec. 31, 1938 executed by Nelly LeFranc Horney and Celine H. Delmas to San Jose Abstract & Title Insurance Co. as trustee, and A. J. Koch as beneficiary, recorded Jan. 20, 1939 in Vol. 911 of Official Records, page 384, Santa Clara County Records.....	15,000.00
Interest to date of death.....	147.50
8. Promissory note for \$40.00 dated 5/16/38 ex- ecuted by J. G. Roberts to A. J. Koch, payable on Aug. 16, 1938, Unsecured	0.00
[In pencil]: Insolvent not collectible. Interest to date of death	
Total	115,962.36

Estate of Adolph J. Koch

Instructions for Schedule C

Mortgages, Notes, and Cash

The classes of property under this schedule should be listed separately in the order given.

Mortgages.—State (1) face value and unpaid balance, (2) date of mortgage, (3) date of maturity, (4) name of maker, (5) property mortgaged, and (6) interest dates and rate of interest. For example: Bond and mortgage for \$9,000, unpaid balance \$6,000; dated January 1, 1935, John Doe

(Petitioner's and Respondent's Exhibit A-1—
Continued)

to Richard Roe; premises 22 Clinton Street, Newark, N. J., due January 1, 1938; interest payable at 6 percent per annum January 1 and July 1. Reference is made to article 13 (5) of Regulations No. 80.

Notes, promissory.—Show similar data.

Contract by the decedent to sell land.—Show name of vendee, date of contract, description of property, sale price, initial payment, amounts of installment payments, unpaid balance of principal and interest rate.

Cash in possession.—List separately from bank deposits.

Cash in bank.—State bank and address, amount in each bank, serial number and nature of account, showing whether checking, savings, time deposit, etc. If statements are obtained from banks they should be retained for inspection by an Internal Revenue agent. Reference is made to article 13 (6) of Regulations No. 80.

Estate of nonresident alien.—In the case of an estate of a nonresident alien of the United States (or a nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) mortgages or notes owned by the decedent at the time of death must be included hereunder if the mortgagors or makers were residents of the United States or, regardless of the residence of the mortgagors or makers, if the mortgage certificates or notes were physically in the

(Petitioner's and Respondent's Exhibit A-1—
Continued)

United States at the time of death. If such decedent was engaged in business in the United States at the time of his death, accounts in banks situated in the United States must be included hereunder. Report fully all facts concerning any account not included. Reference is made to article 50 of Regulations No. 80.

Schedule D

INSURANCE

(See instructions on reverse of this sheet)

(1) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No") No.

(2) Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "Yes" or "No") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
	No life insurance but Shriners benefit fund paid \$500 to son George A. Koch and \$500 to grandson Ralph J. Swickard			
	Total		\$.....	\$.....
	Less amount receivable by beneficiaries, other than the estate, not in excess of \$40,000.....		\$.....	\$.....
	Total Included (also enter under the Recapitulation, Schedule O)		\$.....	\$.....

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Instructions for Schedule D

Insurance

Include in the gross estate all insurance on the life of the decedent as follows: (a) The full amount of insurance receivable by or for the benefit of the estate; (b) the amount that exceeds \$40,000 of the aggregate insurance receivable by beneficiaries other than the estate where the decedent possessed any of the legal incidents of ownership. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

Insurance payable to the estate should be listed first, and immediately following should be listed all insurance payable to beneficiaries other than the estate whether the executor believes that the decedent possessed any of the legal incidents of ownership or not. If the executor believes that the decedent did not possess any of the legal incidents of ownership the amount receivable should be disclosed under the second column headed "Description", and a photostatic copy of the policy should be filed with the return. Deduction may be taken at the bottom of the schedule equal to the amount of the proceeds of insurance receivable

(Petitioner's and Respondent's Exhibit A-1—
Continued)

by beneficiaries other than the estate and shown in the fourth or fifth columns, but not exceeding \$40,000. In describing the policy, state name of company, number of policy, and name of beneficiary.

The "Life insurance statement", Form 712, for each policy listed hereunder should be obtained from the insurance company by the executor and filed with the return.

For further instructions see articles 25 to 28, inclusive, Regulations No. 80.

Estate of nonresident alien.—In the case of an estate of a nonresident alien of the United States (or an estate of a nonresident, regardless of citizenship, if the decedent died prior to the enactment of the Revenue Act of 1934) the proceeds of insurance on his life need not be included. Reference is made to article 50 of Regulations No. 80.

Schedule E

JOINTLY OWNED PROPERTY

(See instructions on reverse of this sheet)

(1) Did the decedent, at the time of his death, own any property as a joint tenant or as a tenant by the entirety, with right of survivorship? (Answer "Yes" or "No") Yes.

(2) If so, state the name and address of each surviving

(Petitioner's and Respondent's Exhibit A-1—

Continued)

Schedule E—(Continued)

cotenant. Goerge A. Koch, 144 Funston Ave., San Francisco, Calif.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
	Joint bank account [Inserted in pencil: (Commercial)] in name of A. J. Koch and George A. Koch in The First National Bank of San Jose, California		\$	\$ 26,543.03
Total (also enter under the Recapitulation, Schedule O)\$.....				\$ 26,543.03

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule E

Jointly Owned Property

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenant by the entirety, with right of survivorship, must be disclosed under this schedule.

The full value of the property must be included in the gross estate, unless it can be shown that a part of the property originally belonged to the other tenant or tenants and was never received or acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth. Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for

(Petitioner's and Respondent's Exhibit A-1—
Continued)

less than an adequate and full consideration in money or money's worth, there should be omitted only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants. For the purposes of the estate tax, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of the value of the property should be included. Where the property was acquired by the decedent and another person or persons by gift, bequest, devise, or inheritance as joint tenants, and their interests are not otherwise specified or fixed by law, then there should be included only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the entire property is includible in the gross estate for purposes of the tax, the burden is upon him to show his right to include such lesser value, and in such case he should make proof of the extent, origin, and nature of the decedent's interest and the interest of the decedent's cotenant or cotenants.

In every instance a statement under the column headed "Description" must disclose whether the whole or only a part of the property is included in

(Petitioner's and Respondent's Exhibit A-1—
Continued)

the gross estate. If only a part of the property is included in the gross estate, the fair market value of the whole must be shown under "Description."

Property in which the decedent held an interest as a tenant in common should not be listed under this schedule, but the value of his interest therein, should be returned under Schedule A, if real estate, or if personal property, under such other appropriate schedule. The decedent's interest in a partnership should not be included under this schedule, but should be shown under Schedule F, "Other miscellaneous property."

For further instructions, see articles 22 and 23 of Regulations No. 80.

Schedule F

OTHER MISCELLANEOUS PROPERTY

(See instructions on reverse of this sheet)

(1) Did the decedent at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No") No.

(2) Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" or "No") No.

Item No.	Description	Subsequent valuation date	Value under option	Value at date of death
			\$	\$
	None			
Total (also enter under the Recapitulation, Schedule O)			\$	\$

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Instructions for Schedule F
Other Miscellaneous Property

Under this schedule list all items of the gross estate not returnable under any other schedule, such as the following. Debts due the decedent; interests in business; claims; rights; royalties; pensions; leaseholds; judgments; share in trust funds; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock; farm machinery; automobile; etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statements of assets and liabilities as of the valuation date and for the 5 years preceding, and statements of the net earnings for the same 5 years. Good will must be accounted for. In general, the same information should be furnished and the same methods followed as in valuing close corporations.

In case of an interest in a trust fund, duplicate copies of the trust instrument should be submitted.

In describing an annuity, the name and address of the grantor of the annuity should be given, or if payable out of a trust or other fund, such a description as will fully identify it. If payable for a term of years, the duration of the term and the date on which it began should be given, and if payable for the life of a person other than the decedent, the date of birth of such person should be stated.

For further instructions, see articles 11, 12, 13, and 50 of Regulations No. 80.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule G

Transfers During Decedent's Life

(See Instructions on reverse of this sheet)

(1) Did the decedent make any transfer described in the first paragraph (including the six subparagraphs) of the instructions on the reverse of this sheet? (Answer "Yes" or "No.") No.

(2) Did the decedent, within 2 years immediately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") Yes.

(3) Did the decedent, at any time, make a transfer of an amount of \$5,000 or more without an adequate and full consideration in money or money's worth, but not believed to be includible in the gross estate as indicated in the first paragraph (including the six subparagraphs) of the instructions for this schedule? (Answer "Yes" or "No.") Yes.

(4) If the answer to question (3) is "Yes" state date, amount of value, character of transfer, and motive which actuated the decedent in making the transfer.

.....
.....

(5) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No.") Yes.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule G—(Continued)

Item No.	Description	Subsequent val- uation date	Value under option	Value at date of death
-------------	-------------	--------------------------------	-----------------------	---------------------------

\$

\$

(Additional pages are attached describing the transferred property and the motive therefor.)

[In pencil]: Taxed by state for inherit tax purposes.

Total (also enter under the
Recapitulation, Schedule O) \$

\$

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch.

Item No.

Donee's name and address: Ralph J. Swickard, San Jose, California

Motive: A gift of sufficient amount so that the income therefrom will be enough to cover his future college expenses.

Description of Gifts: Dated December 20, 1938
Transferred under Trust agreement with Geo. A. Koch,
Trustee

- | | | |
|----|--|------------|
| 1. | 5 - \$1000 bonds of Consolidated Edison Co. (NY) 3½ deb. due 1956..... | \$ 5268.75 |
| 2. | 10 \$1000 bonds of Pac. Gas & Elec. Co. 3½ deb. due 1966 | 10643.50 |
| 3. | 10 \$1000 bonds of American Tel. & Tel. Co. 3¼ deb. due 1961 | 10562.50 |
| 4. | \$10000.00 savings acct. deposit in First Nat'l Bank of San Jose | 10000.00 |
| 5. | \$5000.00 Independent Bldg. & Loan cert. San Jose, Cal. | 5000.00 |
| 6. | 100 sh. com. stock Am. Tel. & Tel. Co. Cert. QG 84719 | 14625.00 |
| 7. | 100 sh. com. stock Byron Jackson Co. Cert. B 25813 | 1650.00 |

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Item No.	Schedule G—(Continued)	
8.	100 sh. com. stock Byron Jackson Co. Cert. 9759	1650.00
9.	100 sh. com. stock Byron Jackson Co. Cert. B 36187	1650.00
10.	100 sh. 1st Pfd. Pac. Gas & Elec. Co. Cert. C6192 5½%	2812.50
11.	100 sh. 1st Pfd. Pac. Gas & Elec. Co. Cert. C6193 5½%	2812.50
12.	100 sh. 1st Pfd. Pac. Gas & Elec. Co. Cert. 25690 6%	3143.75
13.	100 sh. 1st Pfd. Pac. Gas & Elec. Co. Cert. 25691 6%	3143.75
14.	100 sh. 1st Pfd. Pac. Gas & Elec. Co. Cert. 25692 6%	3143.75
		<hr/> \$ 76106.00

Donee's name and address: George A. Koch, 144 Funston Ave., San Francisco, Calif.

Motive: A Christmas remembrance and to equalize the gift made to grandson Ralph Swickard.

Description of Gifts. Dated December 20, 1938

15.	5 \$1000 bonds of Public Service of Northern Ill. 1st 3½, 1968	\$ 5268.75
16.	10 1000 bonds of Pac. Gas. & Elec. Co., 3¾% Series II, 1961	10950.00
17.	10 \$1000 bonds of Am. Tel. & Tel. Co., 3¼ Deb. due 1966	10562.50
18.	\$10000 savings acct. deposit in 1st Nat'l Bank of San Jose, Cal.	10000.00
19.	\$5000.00 Independent Bldg.-Loan Cert. of San Jose, Calif.	5000.00
20.	100 sh. common stock Am. Tel. & Tel. Co., Cert. QG41677	14625.00
21.	100 sh. common stock Byron Jackson Co., Cert. 9760	1650.00
22.	100 sh. common stock Byron Jackson Co., Cert. 9761	1650.00
23.	100 sh. common stock Byron Jackson Co., Cert. 9762	1650.00
24.	100 sh. 1st Pfd. 5½% Pac. Gas. & Elec. Co.	

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Item No.	Schedule G—(Continued)	
	Cert. C6194	2812.50
25.	100 sh. 1st Pfd. 5½% Pac. Gas & Elec. Co. Cert. C6196	2812.50
26.	100 sh. 1st Pfd. 6% Pac. Gas & Elec. Co. Cert. C 25693	3143.75
27.	100 sh. 1st Pfd. 6% Pac. Gas & Elec. Co. Cert. C 36964	3143.75
28.	100 sh. 1st Pfd. 6% Pac. Gas & Elec. Co. Cert. C 36965	3143.75
		<hr/>
		\$ 76412.50

Estate of Adolph J. Koch

Donee's name and address: George A. Koch, 144 Funston Ave. San Francisco, Calif.

Motive: To equalize the gifts to my grandson Ralph Swickard.

Description of gifts and dates:

29.	Jan. 3, 1939—Cash	\$ 4000.00
30.	Jan. 4, 1939—Cash [In pencil]: \$500. Bldg. & L. cert.	10000.00
31.	Jan. 15, 1939—10 shs. San Jose First National Bank ½ [In pencil] S I T 2650	1500.00
32.	May, 1939—An undivided one-half interest in real estate (hereinafter particularly decribed)	9000.00
		<hr/>
		\$ 24500.00

Donee's name and address: Ralph J. Swickard, San Jose, Calif.

Motive: A gift of sufficient amount to establish him in business when through school.

Description of gifts and dates:

33.	Jan. 3, 1939—Cash — [In pencil]: — \$500.— S I T—besides this	\$ 4000.00
34.	Jan. 4, 1939—Cash	10000.00
35.	Jan. 15, 1939—1938 Dodge coupe	500.00
36.	May, 1939—An undivided one-half interest in real estate (hereinafter particularly described)	9000.00
		<hr/>
		\$ 23500.00

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule G—(Continued)

All those certain lots, pieces or parcels of land situate, lying and being in the City of San Jose, County of Santa Clara, State of California, described as follows, viz:

1st. Commencing at a point on the Westerly line of Third Street 148.38 feet Northerly from the intersection of the Northerly line of San Carlos Street with the Westerly line of Third Street; running thence Northerly along said West line of Third Street 67.05 feet; thence Westerly and at right angles to Third Street 137.84 feet; thence Southerly and parallel with Third Street 67.05 feet; thence Easterly and parallel with San Carlos Street 137.84 feet to the place of beginning, being a part of Lot No. 5, Block No. 2, Range No. 3 South of the base line in said City of San Jose. \$6000.00

2nd. Beginning at a point on the Southwesterly line of Market Street, distant thereon Northwesterly 74 feet from the point of intersection of the Northwesterly line of Santa Clara Street with the Southwesterly line of Market Street, and extending thence Northwesterly along the Southwesterly line of Market Street 23 feet 1 $\frac{4}{5}$ inches, more or less, to the center line of a brick wall and being corner of lands of J. A. McKean and Nellie V. McKean; thence at right angles Southwesterly along the center line of said wall and the prolongation thereof 80 feet; thence at right angles Southeasterly 23 feet 1 $\frac{4}{5}$ inches more or less, to the center line of a brick

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule G—(Continued)

wall being in line of the Growers Bank, extending thence Northeasterly along the center line of said wall and parallel with Santa Clara Street 80 feet to the point of beginning. Together with all rights in a certain party wall agreement between the Masonic and Odd Fellows Hall Association and Hypolite Maffre, dated May 4, 1866 and recorded June 12, 1866 in Vol. B of Miscellaneous Records, page 531, Records of said County. \$7500.00

3rd. North half of Lot 8 and the South 10½ feet of Lot 5, in Block 2, Range 3 South of the base line of the City of San Jose, 4500.00

Estate of Adolph J. Koch

The foregoing transfers were not made in contemplation of death and Adolph J. Koch when he made the transfers in 1938 to Ralph J. Swickard did so under a trust agreement dated December 20, 1938 wherein George A. Koch is Trustee and he stated that he was making a gift of sufficient amount so that the income therefrom would be sufficient to cover his grandson's future college expenses, and in making the transfers in 1939 for Ralph J. Swickard he stated as his motive that he was making a gift of sufficient amount to establish his grandson in business when through school.

At the time of making the transfers to George A. Koch in 1938, Adolph J. Koch stated that he made them as a Christmas remembrance and to equalize

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule G—(Continued)

the gift made to his grandson Ralph J. Swickard, and when he made the transfers to George A. Koch in 1939 he stated as his motive that he made these transfers to equalize the gifts made to his grandson Ralph J. Swickard.

The decedent made gift tax returns for each years transfers and paid gift taxes thereon of \$7521.11 for 1938 and \$5100.00 for 1939.

[Longhand notation]: Ralph Swickard born 9/13/21 graduated from H. S. June, 1938. Ralph entered Stanford fall of 1938.

Instructions for Schedule G
Transfers During Decedent's Life

In accordance with the provisions of subdivisions (c) and (d) of section 302 of the Revenue Act of 1926, as amended, the following transfers made by the decedent during his life, by trust or otherwise, other than bona fide sales, for an adequate and full consideration in money or money's worth, are subject to the tax, and must be included in the gross estate under this schedule:

(1) Transfers subsequent to the enactment of the Revenue Act of 1916 made in contemplation of death.

(2) Transfers upon condition that title was not to pass from the decedent unless the beneficiary survived the decedent, or transfers intended to take effect in possession or enjoyment at or after the decedent's death.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

(3) Transfers made after the enactment of the Revenue Act of 1916 whereby the use, possession, or income was retained by the decedent for his life, or for a period only ascertainable by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment for his life, except where the decedent died prior to 5 p. m., eastern standard time, June 6, 1932, and the transfer was made prior to 10:30 p. m., eastern standard time, March 3, 1931.

(4) Transfers whereby the decedent retained, for his life, or for a period only ascertainable by reference to his death, or for a period of such duration as to evidence an intention that it should continue for his life, the right, either alone or in conjunction with any other person or persons, to designate who shall possess or enjoy the property or any of the income, as follows:

(a) In case the right permitted the determination of the ultimate disposition of the property, the transfer is taxable, whether it was made before or after the enactment of the Revenue Act of 1916.

(b) In case the right was limited to the disposition of the possession, enjoyment, or income during decedent's life, or during a period only ascertainable by reference to his death, or during a period of such extent as to evidence an intention that it should continue for his life, the transfer is taxable, if it was made after the enactment of the Revenue

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Act of 1916, except where the decedent died prior to 5 p.m., eastern standard time, June 6, 1932, and the transfer was made prior to 10:30 p.m., eastern standard time, March 3, 1931.

(5) Transfers of property, the enjoyment of which was subject at decedent's death to any change through the exercise, either by decedent alone or in conjunction with any person, of a power to alter, amend, revoke, or terminate.

(6) Transfers, made after the enactment of the Revenue Act of 1916, resulting from the relinquishment in contemplation of death of the decedent's power, exercisable either alone or in conjunction with any person, to alter, amend, revoke, or terminate.

Transfers included in the gross estate should be valued as of the date of the decedent's death, or, if the optional valuation is adopted, in accordance with subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935. If only a portion of the property is so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in the value of the gross estate. If the transferee makes additions to the property, or betterments, the enhanced value of the property at the valuation date, due to such additions or betterments, should not be included. However, where only a portion of the value of the property is included, the value of the whole must be disclosed

(Petitioner's and Respondent's Exhibit A-1—
Continued)

under the column headed "Description", together with an explanation of the proportionate inclusion.

To constitute a bona fide sale for an adequate and full consideration in money or money's worth, it must have been made in good faith, and the price must have been an adequate and full equivalent, and reducible to a money value. If the price was less than an adequate and full equivalent, only the excess of the fair market value of the property, as of the valuation date, over the price received by the decedent should be included in the gross estate. For the purpose of the estate tax the relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, is not to any extent a consideration in money or money's worth.

All transfers made by the decedent during his life of an amount of \$5,000 or more except bona fide sales for an adequate and full consideration in money or money's worth, must be disclosed in the return, whether the executor regards such transfers as subject to the tax or not. If the executor believes that such a transfer is not subject to the tax a statement of the pertinent facts should be made.

In case a transfer, by trust or otherwise, was made by a written instrument, duplicate copies thereof must be filed with the return. If of public record, one of the copies should be certified; if not of rec-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

ord, one copy should be verified. If the decedent was a non-resident, only one copy need be filed, certified or verified, as the case may be.

The name of the transferee, date and form of transfer, and a complete description of the property should be set forth in this schedule. Rents and other income must be included as explained under "Execution of Return" in the general instructions.

For further instructions, see articles 15 to 21, inclusive, of Regulations No. 80.

Nonresident alien.—If the decedent was a non-resident alien (or a nonresident, regardless of citizenship, if death occurred prior to the enactment of the Revenue Act of 1934) the transfer must be included if the property was situated in the United States, either at the date of the decedent's death, or at the date of the transfer. Reference is made to article 50 of Regulations No. 80.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule H

POWERS OF APPOINTMENT

(See instructions on reverse of this sheet)

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

Item No.	Description	Subsequent val- uation date	Value under option \$	Value at date of death \$
	None			
<hr/>				
Total (also enter under the Re- capitulation, Schedule O)			\$.....	\$.....

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule H

Powers of Appointment

In accordance with subdivision (f) of section 302 of the Revenue Act of 1926, as amended, property passing under a general power of appointment must be included in the gross estate under this schedule if exercised by the decedent (A) by will, or (B) by deed resulting in any of the transfers described in subparagraphs (1), (2), (3) and (4) of the first paragraph of the instructions for Schedule G; except in case of a bona fide sale for an adequate and full consideration in money or money's worth, or

(Petitioner's and Respondent's Exhibit A-1—
Continued)

where the decedent died prior to the enactment of the Revenue Act of 1918.

. If the power is exercised for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there should be included in the gross estate only the excess of the fair market value, at the applicable valuation date, of the property passing under the power over the value of the consideration received by the decedent.

Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee (or appointor) of the power. If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate.

Duplicate copies of the instrument granting the power and of the instrument by which the power was exercised, one of each to be certified or verified, must be filed with the return, unless the decedent was a nonresident, in which case only one copy of each instrument, certified or verified, is required. The copies must be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned for tax.

For further instructions, see article 24, Regulations No. 80

(Petitioner's and Respondent's Exhibit A-1—Continued)

Schedule I

PROPERTY PREVIOUSLY TAXED

(See instructions on reverse of this sheet)

Name of donor or prior decedent.....If a decedent, show date of death.....

If a donor, show date of gift.....

Residence of donor at time of gift, or of prior decedent at time of death.....

Item No.	Description of property, subsequent valuation dates, and description and amounts of mortgages or other liens paid	(Column A) Value under option	(Column B) Income under option	(Column C) Value at date of death	(Column D) Income accrued at date of death	(Column E) Finally determined value in prior estate or gift
	None	\$	\$	\$	\$	\$
	Totals.....	\$	\$	\$	\$	\$

Total included in gross estate (total of columns A and B, or total of columns C and D, whichever is applicable) (also enter under Recapitulation, Schedule O)\$.

(a) Gross deduction (total of applicable column A or C, or total of column E, whichever is lower)\$.

(b) Total amount paid on mortgages or other liens deducted in prior estate or gift (enter detailed information at bottom of column headed "Description")\$.

(c) Deduction for property previously taxed without proportionate reduction (item (a) minus (b)) (also enter under Schedules P and Q, or Schedule R)\$.

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Instructions for Schedule I

Property Previously Taxed

Property includible in the gross estate that was received from a person who died within 5 years prior to the decedent's death or received by gift within 5 years prior to the decedent's death, or acquired in exchange therefor, with respect to which a deduction is authorized because an estate tax was paid by the prior estate or a gift tax was paid by the donor, should be returned in this schedule. The deduction for such property is authorized under the provisions of subdivision (a) (2) or subdivision (b) (2) of section 303 of the Revenue Act of 1926, as amended, in accordance with the following conditions and limitations, if the decedent died after 5 p. m., eastern standard time, June 6, 1932 (if death occurred prior to that time see article 41 of Regulation No. 80):

(a) Conditions:

(1) The property must have been received by the decedent by gift, bequest, devise, or inheritance from a prior decedent who died within 5 years of the decedent's death, or received by him as a gift within 5 years of his death.

(2) The property must be identified either as the same which the decedent so received or as property acquired in exchange therefor.

(3) The property so received must have formed a part of the gross estate situated in

(Petitioner's and Respondent's Exhibit A-1—
Continued)

the United States of such prior decedent, or have been included in the total amount of gifts of the donor.

(4) An estate tax by or on behalf of the estate of such prior decedent, or a gift tax by or on behalf of the donor, must have actually been paid (the mere filing of a return for such estate or donor not being sufficient).

(5) If the decedent died after 11:40 a. m., eastern standard time, May 10, 1934, no such deduction, in respect to the property or property exchanged therefor, must have been allowable in determining the value of the net estate of the prior decedent.

(b) Limitations:

(1) The deduction is limited to the aggregate value of the property as finally determined in the case of the prior decedent or donor, or to the aggregate value of such property included in the value of the gross estate of the present decedent, whichever is lower.

(2) The deduction, as limited in (1), is reduced by the total amount paid prior to the decedent's death on any mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in determining the estate tax of the prior decedent or the gift tax of the donor.

(3) The deduction is further reduced by the proportion of the total other deductions (al-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

lowable under Schedules J, K, L, M, and N, and the specific exemption if applicable) which the amount otherwise deductible for property previously taxed bears to the amount of the gross estate.

The value of each item of property and any income thereon determined as of the applicable date or dates for inclusion in the value of the gross estate of the present decedent should be entered under the appropriate columns A, B, C, and D. It will be noted that column A is provided for the value under the option of the principal of each item of property and column B for any income thereon under the option, and that column C is provided for the value at the date of the decedent's death of the principal of each item of property, and column D is provided for any income thereon accrued to the date of death. The value finally determined in the prior estate or gift of the principal only of each item of property should be entered in column E .

The description should show the schedule and item number of the property as it appeared in the prior return. To make it clear that the schedule and item number relate to the prior return, they should be included in parentheses. If only a portion of an item in the prior estate is reflected in the present estate, that fact should be indicated and only a proportionate part of the value of the item

(Petitioner's and Respondent's Exhibit A-1—
Continued)

in the prior estate, as finally determined, should be entered in column E.

In accordance with the foregoing second limitation, any amount paid before the death of the present decedent in discharge of a mortgage or other lien on the property previously taxed, provided such mortgage or other lien was deducted in the prior case, should be shown last under the column headed "Description", together with an identification of the item of property involved and the item deducted in the prior case. The total of such amounts paid should be entered at item (b).

It will be noted that the "Total included in gross estate" (included in the value of the gross estate utilized for the computation of the tax) is the total of columns A and B if the optional valuation is adopted, or the total of columns C and D if the optional valuation is not adopted. However, if the optional valuation is adopted, both such totals should be entered under the appropriate columns under the Recapitulation, Schedule O.

The amount of the gross deduction for property previously taxed, in accordance with the first limitation, is entered at item (a). If the optional valuation is adopted, the amount of the gross deduction is the total of column A or the total of column E, whichever is the lower. If the optional valuation is not adopted, the amount of the gross deduction is the total of column C or the total of column E, whichever is the lower. The amount of item (b)

(Petitioner's and Respondent's Exhibit A-1—
Continued)

is subtracted from the amount of item (a); and the difference, which is entered as item (c), is the amount of the deduction as reduced in accordance with the second limitation. The amount of the net deduction for property previously taxed, as reduced by a certain proportion of the total other deductions in accordance with the third limitation, is finally computed under Schedule P, Q or R.

For further instructions, see article 41, 42, 43, and 53 of Regulations No. 80.

DEDUCTIONS

Schedule J

FUNERAL AND ADMINISTRATION EXPENSES

(See instructions on reverse side of this sheet)

Item No.	Funeral expenses	Amount
	Amos O. Williams Co., San Jose, Calif.....	\$ 302.68
	Oak Hill Cemetary Association, San Jose, Calif.	35.50
	Western Granite Co., San Jose, Calif.....	10.00
Total (also enter under the Recapitulation, Schedule O)		\$ 348.08
Amount of executors' commissions (also enter under the Recapitulation, Schedule O).....		\$ 1990.62
[In pencil]: Pd. Feb. - 1940		
Estimated xxxxxxxx (Strike out words not ap- plicable)		
Amount of attorneys' fees (also enter under the Recapitulation, Schedule O)		\$ 1990.62
[In pencil]: Pd. Feb., 1940		
Estimated xxxxxxxx (Strike out words not ap- plicable)		

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule J—(Continued)

Item No.	Miscellaneous Administration expenses	Amount
	Clerk—filing petition for probate	\$ 7.00
	“ issuing letters and copies	2.25
	Publication of notice of probate	15.00
	“ “ to creditors	10.00
	Certified copies of letters	5.00
	“ “ orders	5.00
	Recording “ “	5.00
	Certified copies of will and reports.....	3.20
	Appraiser's fees	117.00
	Miscellaneous expenses—estimated	10.00
Total (also enter under the Recapitulation, Schedule O)		\$ 179.45

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule J

Funeral and Administration Expenses

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. An item may be entered for deduction though the exact amount is not known at the time, provided it is ascertainable with reasonable certainty, and will be paid. No deduction may be taken upon the basis of a vague or uncertain estimate. Preserve all vouchers and receipts for inspection by an Internal Revenue agent.

The executor or administrator, when filing the return, may deduct his commissions in such an

(Petitioner's and Respondent's Exhibit A-1—
Continued)

amount as has actually been paid or which at that time it is reasonably expected will be paid, but no deduction may be taken if no commissions are to be collected. In the case the amount of the commissions has not been fixed by decree of the proper court, the deduction will be allowed on the final audit of the return provided: (1) That the Commissioner is reasonably satisfied that the commissions claimed will be paid; (2) that the amount entered as a deduction is within the amount allowable by the laws of the jurisdiction wherein the estate is being administered; and (3) that it is in accordance with the usually accepted practice in said jurisdiction in estates of similar size and character. If the commissions claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor stating that such amount has been agreed upon and will be paid.

A bequest or devise to the executor in lieu of commissions is not deductible. If, however, the decedent fixed by his will the compensation payable to the executor for services to be rendered in the administration of the estate, deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice.

Amounts paid as trustees' commissions do not constitute expenses of administration and are not

(Petitioner's and Respondent's Exhibit A-1—
Continued)

deductible, whether received by the executor acting in the capacity of a trustee or by a separate trustee as such.

When filing the return there may be deducted such an amount of attorney's fees as has actually been paid or which at that time it is reasonably expected will be paid. If on the final audit of the return the fees claimed have not been awarded by the proper court and paid, the deduction will be allowed, provided the Commissioner is reasonably satisfied that the amount claimed will be paid and that it does not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate and the local law and practice. If the fees claimed have not been paid at the time of the final audit of the return, the amount deducted must be supported by an affidavit of the executor or the attorney stating that such amount has been agreed upon and will be paid.

Attorney's fees incident to litigation instituted by the beneficiaries as to their respective interests do not constitute a proper deduction, inasmuch as expenses of this character are properly charged against the beneficiaries personally and are not administration expenses as contemplated by the statute.

Executors and attorneys should note that executors' commissions and attorneys' fees constitute taxable income and that the amounts received or re-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

ceivable by them as such compensation are cross-referenced for income-tax purposes.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Deduction for property taxes is limited to such taxes as accrued prior to the decedent's death. Credit to a limited extent may, under "Computation of Tax", sheet XX be claimed for estate, legacy, succession, inheritance, and gift taxes.

For further instructions, see articles 29 to 35, inclusive, and article 52 of Regulations No. 80.

Schedule K

DEBTS OF DECEDENT

(See instructions on reverse of this sheet)

Item No.	Creditor and nature of claim	Amount
1.	San Jose Ambulance Co. [In pencil] not legally enforceable obligation	\$ 5.00
2.	Mrs. Compton—(nurse) San Jose Calif.— [In pencil]: housekeeper for dec. Davis	500.00
3.	E. Vain — (nurse) San Jose Calif.....	5.50
4.	M. Le Fevre—(nurse) “ “ “	5.50
5.	San Jose Hospital “ “ “	11.78
6.	Mrs. Compton—salary “ “ “	75.00
7.	Dr. J. H. Shepard “ “ “	15.00
8.	Dr. A. T. McGinty “ “ “	37.00
9.	Chas. C. Navelet “ “ “	15.45
10.	L. H. Helwig—claim—tax services re gift & income tax matters, San Jose, Calif.....	650.00
11.	Miscellaneous debts	15.45
12.	Federal income tax.....	125.00

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule K—(Continued)		
Item No.	Creditor and nature of claim	Amount
13.	Calif. income tax	34.00
14.	Deficiency—U. S. gift tax	27.00
15.	“ 1936 U. S. income taxes	14.00
Total (also enter under the Recapitulation, Schedule O)		\$ 1535.68

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule K

Debts of Decedent

Itemize under this schedule only valid debts of the decedent owed by him at the time of death, except those secured by mortgage or other lien upon his property. Any indebtedness secured by a mortgage or other lien upon property of the gross estate should be entered under Schedule L. If the amount of the debt is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. If the claim is contested, that fact should be stated.

If the claim is founded upon a promise or agreement the deduction is limited to the extent that the liability was contracted bona fide for an adequate and full consideration in money or money's worth. A pledge or subscription evidenced by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent that such pledge or subscription was made bona

(Petitioner's and Respondent's Exhibit A-1—

Continued)

fide for an adequate and full consideration in cash or its equivalent.

The deduction for property taxes is limited to such taxes as accrued prior to the date of the decedent's death. Federal taxes on income received during decedent's lifetime are deductible, but taxes on income received after death are not deductible.

Enter in this schedule notes unsecured by mortgage or other lien and give full details, including name of payee, face and unpaid balance, date and term of note, interest rate and date to which interest was paid prior to death. Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: Edison Electric Illuminating Co., for electric service during December 1935, \$25.

If the amount of the claim is the unpaid balance due on a contract for the purchase of any property of the gross estate, indicate the schedule and item number where such property is returned. If the claim represents a joint and several liability, the facts must be fully stated and the financial responsibility of the co-obligor explained.

All vouchers or original records should be preserved for inspection by an Internal Revenue agent.

For further instructions, see articles 29, 30, 36, 37, and 52 of Regulations No. 80.

(Petitioner's and Respondent's Exhibit A-1—
Continued)Schedule L
MORTGAGES AND LIENS

(See instructions on reverse of this sheet)

Item No.	Description	Amount
		\$
None		
Total (also enter under the Recapitulation, Schedule O)		\$.....

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule L

Mortgages and Liens

Itemize under this schedule only obligations secured by mortgages or other liens upon property included in the gross estate. List under this schedule all notes and other obligations secured by the deposit of collateral, such as stocks, bonds, etc. Debts of the decedent unsecured by mortgage or other lien upon the property should be listed under Schedule K. Identify, by indicating under the column headed "Description", the particular schedule and item number where such property subject to the mortgage or lien is returned under the gross estate. The full value of the property, without any reduction for the mortgage or other indebtedness, must be returned as part of the gross estate. Real estate situated outside the United States does not form a part of the gross estate for the purpose of the tax, and no deduction may be taken of any

(Petitioner's and Respondent's Exhibit A-1—
Continued)

mortgage thereon, or any indebtedness in respect thereto.

Show the name and address of the mortgagee, payee, or obligee, and the date and term of the mortgage, note, or other agreement under which the indebtedness is established. Show the face amount, the unpaid balance, the rate of interest, and date to which the interest was paid prior to the decedent's death.

Mortgages upon, or any indebtedness with respect to, property included in the gross estate is deductible only to the extent that the liability was contracted bona fide and for an adequate and full consideration in money or money's worth.

For further instructions, see articles 29, 30, 38, and 52 of Regulations No. 80.

Schedule M

NET LOSSES AND SUPPORT OF DEPENDENTS

(See instructions on reverse of this sheet)

Item No.	Net losses during administration	Amount
		\$
	None	_____
	Total (also enter under the Recapitulation, Schedule O)	\$

Item No.	Support of Dependents	Amount
		\$
	None	_____
	Total (also enter under the Recapitulation, Schedule O)	\$

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Instructions for Schedule M

Net Losses and Support of Dependents

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by insurance or otherwise. Losses must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. In the case of a decedent who died subsequent to the effective date of the Revenue Act of 1932, such losses are not deductible if, at the time of the filing of the estate tax return, such losses had been claimed as a deduction for income tax purposes in an income tax return. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other compensation was received on account of loss, state the amount collected. The property with respect to which the loss is claimed should be identified by indicating the particular schedule and item number where such property is returned under the gross estate.

If the optional valuation is adopted, deduction for any loss is limited to the extent that such loss is not in effect allowed in the valuation of the item in the gross estate.

Support of dependents.—No deduction may be

(Petitioner's and Respondent's Exhibit A-1—

Continued)

taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the support of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

For further instructions, see articles 29, 39, 40, and 52 of Regulations No. 80.

Schedule N

CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

(See instructions on reverse of this sheet)

Item No.	Name and address of beneficiary	Character of institution	Amount
			\$
	None		
Total (also enter under the Recapitulation, Schedule O)			\$.....

(If more space is needed, insert additional sheets of same size)

Estate of Adolph J. Koch

Instructions for Schedule N

Charitable, Public, and Similar Gifts and Bequests

Deductions authorized for charitable, public, and similar gifts and bequests as set forth in Regulations No. 80 should be claimed under this schedule. If the transfer was made by will, duplicate copies, one certified, of the order admitting the will to pro-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

bate, in addition to the copies of the will, should be submitted with the return. If the transfer was made by any other written instrument, duplicate copies thereof should be submitted with the return, and if the instrument is of record one copy should be certified and if not of record one copy should be verified. If the transfer was made by will, an affidavit of the executor must be submitted, showing whether the decedent's will has been, or to the best of his knowledge, information, and belief, will be contested. If claim is made for deduction of the value of the residue or of a portion thereof (e. g., present worth of a remainder interest in the residue), there should be submitted a copy of the computation whereby the value was determined.

Where the decedent died after the enactment of the Revenue Act of 1932, and under the terms of the will or the law of the jurisdiction wherein the estate is administered or the law of the jurisdiction imposing the particular tax, the Federal estate tax (including the additional estate tax imposed by the Revenue Act of 1932) or any estate, succession, legacy, or inheritance tax is payable in whole or in part out of any bequest, legacy, or devise deductible hereunder, the sum deductible is the amount of such bequest, legacy, or devise so reduced.

If the optional valuation is adopted, any bequest, legacy, devise, or transfer deductible under this schedule shall be valued for the purpose of the deduction as of the date of the decedent's death, with adjustment for any difference in the value of the

(Petitioner's and Respondent's Exhibit A-1—

Continued)

property 1 year after his death, or at the date of its sale, or exchange within such year, except that no such adjustment may take into account any difference in value due to mere lapse of time or to the occurrence or non-occurrence of a contingency.

See articles 44 to 47, inclusive, and article 54 of Regulations No. 80.

Schedule O RECAPITULATION

Schedule	Gross estate	Value under option	Value at date of death
A	Real estate	\$.....	\$ 0.00
B	Stocks and bonds .....	.....	100.00
C	Mortgages, Notes, and Cash .....	.....	115962.36
D	Insurance .....	.....	.....
E	Jointly owned property .....	.....	26543.03
F	Other miscellaneous property .....	.....	.....
G	Transfers during decedent's life.....	.....	.....
H	Powers of appointment .....	.....	.....
I	Property previously taxed.....	.....	.....
Total Gross Estate		\$.....	\$ 142605.39

Schedule	Deductions	Amount
J	Funeral expenses	\$ 348.08
	Executors' commissions	1990.62
	Attorney's fees	1990.62
	Miscellaneous administration expenses	179.45
K	Debts of decedent	1535.68
L	Mortgages and liens .....	.....
M	Net losses during administration .....	.....
	Support of dependents .....	.....
N	Charitable, public, and similar gifts and bequests .....	.....

Total Deductions, except specific exemption and property previously taxed\$ 6044.45

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule P

NET ESTATE FOR TAX IMPOSED BY 1926 ACT, AS
AMENDED—RESIDENT OR CITIZEN

Instructions.—This schedule should be used only for the estate of an resident or citizen of the United States, except that if death occurred prior to the enactment of the Revenue Act of 1934 it should not be used for the estate of a nonresident citizen of the United States.

1. Total gross estate	\$ 142605.39
2. Total deductions, except specific exemption and property previ- ously taxed	\$ 6044.54
3. Specific exemption	100,000.00
<hr/>	
4. Total deductions, except property previously taxed (Item 2 plus Item 3)	\$ 106044.45
5. Deductions for property previously taxed with- out proportionate re- duction (Schedule I, item c)	\$.....
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1)	\$.....
<hr/>	
7. Net deduction for property previ- ously taxed (item 5 minus item 6)	\$.....
<hr/>	
8. Total deductions (item 4 plus item 7)	\$ 106044.45
<hr/>	
9. Net estate (item 1 minus item 8)....	\$ 36560.94

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule Q

NET ESTATE FOR ADDITIONAL TAX IMPOSED BY
1932 ACT, AS AMENDED—RESIDENT OR CITIZEN

Instructions.—This schedule should be used only for the estate of a resident or citizen of the United States, except that if death occurred prior to the enactment of the Revenue Act of 1934 it should not be used for the estate of a nonresident citizen of the United States.

1. Total gross estate	\$ 142605.39
2. Total deductions, except specific exemption and property previously taxed	\$ 6044.45
3. Specific exemption (40,000 if death occurred on or after Aug. 31, 1935; \$50,000 if prior thereto)....	40000.00
<hr/>	
4. Total deductions, except property previously taxed (item 2 plus item 3)	\$ 46044.45
5. Deduction for property previously taxed without proportionate reduction (Schedule I, item c)	\$.....
6. Proportionate reduction (proportion of item 4 that item 5 bears to item 1)	\$.....
<hr/>	
7. Net deduction for property previously taxed (item 5 minus item 6)	\$.....
<hr/>	
8. Total deductions (item 4 plus item 7)	46044.45
<hr/>	
9. Net estate (item 1 minus item 8)	\$ 96560.94

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule R

NET ESTATE—NONRESIDENT ALIEN

Instructions.—This schedule should be used only for the estate of a nonresident alien of the United States, except that if death occurred prior to the enactment of the Revenue Act of 1934 it should also be used for the estate of a nonresident citizen of the United States. No deductions are allowable hereunder unless the value of that part of the gross estate situated outside the United States is set forth.

1. Value of gross estate in the United States
(Schedules A, B, C, D, E, F, G, H, and I).....\$.....
2. Value of gross estate outside the United States
(insert itemized schedule sheet showing values)
3. Value of total gross estate wherever situated
(item 1 plus item 2)\$.....
4. Gross deductions under Schedule J, K, L, and M
5. Net deductions under Schedule J, K, L, and M
(that proportion of item 4 that item 1 bears to item 3)\$.....
6. Charitable, public, and similar gifts and bequests, Schedule N
7. Total deductions, except property previously
taxed (item 5 plus item 6).....\$.....
8. Deduction for property previously
taxed without proportionate reduction (Schedule I, item c)..... \$.....
9. Proportionate reduction (proportion of item 7 that item 8 bears
to item 1) \$.....
10. Net deduction for property previously taxed
(item 8 minus item 9).....
11. Total deductions (item 7 plus item 10)\$.....
12. Net estate (item 1 minus item 11).....\$.....

Estate of Adolph J. Koch

(Petitioner's and Respondent's Exhibit A-1—
Continued)

COMPUTATION OF TAX

(See instructions on reverse of this sheet)

SIT.—\$8,610.04—per agreement upon contingent taxes.

1. Gross tax imposed by 1926 act, as amended	\$ 365.61	
2. Credit for gift tax imposed by 1924 and/or 1932 act, as amended.....	0.00	
3. Gross tax less credit for gift tax (item 1 minus item 2)	\$ 365.61	
4. Credit for estate, inheritance, legacy, or succession tax	292.48	
5. Net tax imposed by 1926 act, as amended (item 3 minus item 4).....		\$ 73.13
6. Total gross taxes imposed by 1926 and 1932 acts, as amended (Tentative Tax)	\$9,118.53	
7. Gross tax imposed by 1926 act, as amended	365.61	
8. Gross additional tax (item 6 minus item 7)	\$8,752.92	
9. Credit for gift tax imposed by 1932 act, as amended		
10. Net additional tax (item 8 minus item 9)		8,752.92
11. Total net for tax (item 5 plus item 10)		\$8,826.05

Affidavit of Person or Persons Filing Return

We/I, George A. Koch the undersigned executor /administrat /beneficiary /custodian /trustee, swear (or affirm) that we/I have carefully examined this return (including the additional sheets inserted, if any); that to the best of our/my

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Computation Tax—(Continued)

knowledge, information, and belief, herein is listed all of the property constituting the decedent's gross estate, as defined by the statute (or if the decedent was a nonresident alien of the United States, or a nonresident, regardless of citizenship, if he died prior to the enactment of the Revenue Act of 1934, herein is listed all of the property constituting the gross estate situated in the United States, as defined by the statute, and, if deductions are claimed, herein is listed separately all of the property constituting the gross estate situated outside the United States); that we/I have no knowledge of any transfers made or trusts created by the decedent during his lifetime of the value of \$5,000 or more, other than bona-fide sales for an adequate and full consideration in money or money's worth, except as stated in Schedule G; and that, to the best of our/my knowledge, information, and belief, the value shown in the last column of each schedule for every item of property listed herein under the gross estate is the fair market value as of the date of the decedent's death (and, in case the optional valuation is herein adopted, that all of the distributions, sales, exchanges, and other dispositions within the year following the decedent's death of the property included in the gross estate, together with the dates thereof, are fully disclosed, and that the value under the option for every item of property is the fair market value as of the applicable valuation date or is such value as prop-

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Computation Tax—(Continued)

erly adjusted), that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable, and that all statements made herein are true and correct.

(Signature) GEORGE A. KOCH

(Address) 144 Funston Ave

San Francisco, Cal

(Signature)

(Address)

(Signature)

(Address)

Sworn to and subscribed before me this 16th day of October, 1939.

(Notarial)

(Seal) RICHARD I. McCARTHY

(Signature and title of officer administering oath)

Affidavit of Attorney or Agent Preparing Return

I swear (or affirm) that I prepared this return for the person or persons signing the above affidavit and that this return, including the additional sheets inserted, if any, is a true, correct, and complete statement of all the information respecting the estate tax liability of this estate of which I have any knowledge.

FABER L. JOHNSTON

(Address) 1st Nat'l Bank Bldg.

San Jose, Calif.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Computation Tax—(Continued)

Sworn to and subscribed before me this 16th
day of October, 1939.

(Notarial)

(Seal)

RICHARD I. McCARTHY

(Signature and title of officer administering oath)

Estate of Adolph J. Koch

Instructions for Computation of Tax

For computation of tax, use the table set forth
on the inside of the back cover.

Item 1, "Gross tax imposed by 1926 act, as
amended", is computed, by means of column 4 of
the table, on the value of the net estate shown
under Schedule P or Schedule R, as the case
may be.

Item 2, "Credit for gift tax imposed by 1924
and/or 1932 act, as amended", is allowed against
the gross tax imposed by the Revenue Act of 1926,
as amended, if paid by the decedent in respect of
property included in the gross estate. If such gift
tax was imposed by the Revenue Act of 1924, as
amended, the entire amount is allowed. If such
gift tax was imposed by the Revenue Act of 1932,
or by such act as amended, the credit cannot exceed
the proportion of the gross estate tax, item 1, that
the value of the included gift taxed bears to the
entire gross estate. (See article 9 (a) of Regula-
tions No. 80.)

Item 4, "Credit for estate, inheritance, legacy,
or succession tax", cannot exceed 80 percent of

(Petitioner's and Respondent's Exhibit A-1—
Continued)

item 3. (See article 9 (b) of Regulations No. 80.)

Item 6, "Total gross taxes imposed by 1926 and 1932 acts, as amended (Tentative Tax)", is computed on the value of the net estate shown under Schedule Q or Schedule R, as the case may be. If the decedent died on or after August 31, 1935, column 1 of the table should be used for this item. If the decedent died prior to August 31, 1935, and after May 10, 1934, column 2 of the table should be used for this item. If the decedent died prior to May 11, 1934, and after the enactment of the Revenue Act of 1932, column 3 of the table should be used for this item.

Item 9, "Credit for gift tax imposed by 1932 act, as amended", is allowed against the gross additional tax if paid by the decedent in respect of property included in the gross estate. This credit is allowable for gift tax imposed by the 1932 act as originally enacted or by that act as amended. Such credit cannot exceed the proportion of the gross additional estate tax that the value of the included gift taxed bears to the entire gross estate, and furthermore cannot exceed the difference between the total amount of the gift tax and the gift tax credit allowed against the gross estate tax imposed by the 1926 act, as amended. (See article 9 (a) of Regulations No. 80.)

Item 11, "Total net tax", is the sum of the net estate tax imposed by the Revenue Act of 1926, as

(Petitioner's and Respondent's Exhibit A-1—
Continued)

amended, and the net additional estate tax imposed by the Revenue Act of 1932, as amended.

If the decedent died prior to the enactment of the Revenue Act of 1926 consult table II of Regulations No. 80 for the computation of the tax.

For further instructions, see articles 6 to 9, inclusive, of Regulations No. 80.

Example (estate subject to both tax imposed by Revenue Act of 1926, as amended, and additional tax imposed by Revenue Act of 1932, as amended, and involving credit for State inheritance and estate taxes): A resident decedent died January 15, 1936, and the value of the net estate shown under Schedule P is \$210,000. The tax shown in the first subcolumn of column 4 of the table on a net estate equaling \$200,000 is \$4,500. As \$210,000 exceeds \$200,000 and falls below \$400,000, the tax on the excess of \$10,000 is computed at the rate of 4 percent, the rate shown in the second subcolumn of column 4. The \$400 tax on such excess added to \$4,500 gives \$4,900, the gross tax imposed by the Revenue Act of 1926, as amended, which should be entered at item 1. Credit for gift tax is not involved in this example, but it will be assumed that the maximum amount of credit for State estate, inheritance, legacy, or succession taxes is allowable; that is, 80 percent, or \$3,920, which should be entered at item 4. The difference, which is the net tax imposed by the Revenue Act of 1926, as amended, is \$980. The net estate shown under

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Schedule Q is \$270,000. The amount of the total gross taxes imposed by the 1926 and 1932 acts, as amended, shown in the first subcolumn of column 1 on a net estate equaling \$200,000, is \$26,600. As \$270,000 exceeds \$200,000 and falls below \$400,000, the amount of the total gross taxes on the excess of \$70,000 is computed at 20 percent, the rate shown in the second subcolumn of column 1. The \$14,000, computed on such excess, added to \$26,600, gives \$40,600, the total gross taxes imposed by the 1926 and 1932 acts, as amended, and \$40,000 should be entered at item 6. From the \$40,000 is subtracted \$4,900, the gross tax imposed by the Revenue Act of 1926, as amended, and the difference, \$35,700, is the gross additional tax imposed by the Revenue Act of 1932, as amended, which amount should be entered at item 8. As in this example no credit for gift tax is involved, the gross additional tax is the same as the net additional tax. The net tax imposed by the Revenue Act of 1926, as amended, \$980, item 5, added to the net additional tax, \$35,700, item 10, results in a total net tax of \$36,680, item 11. The computation of the tax in this example is set up as follows:

(Petitioner's and Respondent's Exhibit A-1—
Continued)

1. Gross tax imposed by 1926 act, as amended	\$ 4,900	
2. Credit for gift tax imposed by 1924 and/or 1932, as amended	0	
3. Gross tax less credit for gift tax.....	\$ 4,900	
4. Credit for estate, inheritance, legacy, or succession tax	3,920	
5. Net tax imposed by 1926 act, as amended		\$980
6. Total gross taxes imposed by 1926 and 1932 acts, as amended (Tentative Tax)....	\$40,600	
7. Gross tax imposed by 1926 act, as amended	4,900	
8. Gross additional tax	\$35,700	
9. Credit for gift tax imposed by 1932 act, as amended	0	
10. Net additional tax		35,700
11. Total net tax		36,680

Example (estate subject to additional estate tax only): A resident decedent died on July 1, 1936, and the value of the gross estate is \$85,000. Deductions for administration expenses and debts are allowed in the amount of \$10,000, leaving \$75,000 before the deduction of the specific exemption. As the specific exemption allowed by the Revenue Act of 1926, as amended, is \$100,000, it is apparent under Schedule P that this estate is not subject to the estate tax imposed by that act. However, as the specific exemption allowed by the Revenue Act of 1932, as amended by the Revenue Act of 1935, is only \$40,000, this estate is subject to such

(Petitioner's and Respondent's Exhibit A-1—
Continued)

additional estate tax. For the purpose of the additional estate tax the net estate is \$35,000, as would be shown under Schedule Q. The total gross taxes imposed by the 1926 and 1932 acts, as amended, shown in the first subcolumn of column 1 on a net estate equaling \$30,000 are \$1,200. As \$35,000 exceeds \$30,000 and falls below \$40,000, the amount of the total gross taxes on the excess of \$5,000 is computed at the rate of 8 percent, the rate shown in the second subcolumn of column 1. The \$400, computed on such excess, added to \$1,200, gives \$1,600, the total gross taxes imposed by the 1926 and 1932 acts, as amended. As no estate tax is imposed by the Revenue Act of 1926, as amended, this amount is the same as the gross additional tax. As credit for gift tax is not involved in this example, the gross additional tax is the same as the net additional tax. It will be noted that no credit for estate, inheritance, legacy, or succession taxes is authorized in the computation of the additional tax, and consequently the total net tax in this case is \$1,600.

Example (explaining computation of gift tax credits): The decedent, a resident, died on February 1, 1936. The amount of the gross estate tax imposed by the 1926 act, as amended, is \$15,000, and the amount of the total gross estate taxes imposed by the 1926 and 1932 acts, as amended, is \$91,900. The total value of the gross estate is \$600,000. During his life the decedent made cash

(Petitioner's and Respondent's Exhibit A-1—
Continued)

gifts in contemplation of death as follows: In 1925, \$60,000; in 1933, \$300,000; and in 1934, \$70,000. These gifts (total, \$430,000) are included in the gross estate. He paid gift taxes on the gifts as follows: For 1925, \$100; for 1933, \$13,725; and for 1934, \$5,200. Credit for the gift tax imposed by the 1924 act is allowed against the gross tax imposed by the 1926 act, as amended, in the entire amount, \$100. Credit for the gift taxes (total, \$18,925) imposed by the Revenue Act of 1932 is allowed against the gross tax imposed by the 1926 act, as amended, not to exceed the proportion of \$15,000, item 1, that the value of such included gifts taxed, \$360,000, bears to the entire gross estate, \$600,000. It will be noted that the amount of the gifts taxed, under the 1932 act is \$370,000 less \$10,000, the amount excluded in determining the total gifts for the purposes of the gift Instructions for Computation of Tax—Continued tax. \$15,000 multiplied by .60 gives \$9,000, the maximum credit here allowed for such taxes. The total gift tax credits allowed against the gross tax imposed by the Revenue Act of 1926, as amended, is \$9,100, which is entered at item 2. The difference between \$15,000 and \$9,100 is entered at item 3. Maximum credit for State inheritance and estate taxes is allowed in this example in the amount of \$4,720, entered at item 4. The net tax imposed by the Revenue Act of 1926, as amended, is \$1,180, item 5. \$15,000 is entered at item 7 and

(Petitioner's and Respondent's Exhibit A-1—
Continued)

the gross additional tax, \$76,900, is entered at item 8. No credit against gross additional estate tax is allowable for gift tax paid under the Revenue Act of 1924. Credit for the gift taxes paid (total \$18,925) under the Revenue Act of 1932, is allowed against the gross additional estate tax, not to exceed the proportion of \$76,900, item 8, that the value of the included gifts taxed, \$360,000, bears to the entire gross estate, \$600,000. The amount of this proportion is \$46,140. However, this credit is further limited by an amount not to exceed the difference between the total of such gift taxes, \$18,925, and the credit, \$9,000, allowed for such taxes against the estate tax imposed by the 1926 act, as amended. This difference, \$9,925, is the amount of the credit allowed against the gross additional tax, and is entered at item 9. The net additional tax, item 8 minus item 9, is \$66,975, and is entered at item 10. The total net tax, \$68,155, which is the sum of item 5 and item 10, is shown at item 11. The computation of the tax in this example is set up as follows:

(Petitioner's and Respondent's Exhibit A-1—
Continued)

1. Gross tax imposed by 1926 act, as amended	\$15,000	
2. Credit for gift tax imposed by 1924 and/or amended	9,100	
	<hr/>	
3. Gross tax less credit for gift tax.....	\$ 5,900	
4. Credit for estate, inheritance, legacy, or succession tax	4,720	
	<hr/>	
5. Net tax imposed by 1926 act, as amended		\$1,180
6. Total gross taxes imposed by 1926 and 1932 acts, as amended (Tentative Tax) ..	\$91,000	
7. Gross tax imposed by 1926 act, as amended	15,000	
	<hr/>	
8. Gross additional tax	\$76,900	
9. Credit for gift tax imposed by 1932 act, as amended	9,925	
	<hr/>	
10. Net additional tax		66,975
		<hr/>
11. Total net tax		\$68,155

(Petitioner's and Respondent's Exhibit A-1—Continued)

TABLE FOR COMPUTING ESTATE TAX

(A) Net estate equaling—	(B) net estate not exceeding—	(1) In effect on and after Aug- ust 31, 1935. (Tentative tax, 1932 act as amended.) Total taxes imposed by 1926 act and by 1932 act amend- ed by 1935 act.		(2) In effect from May 11, 1934, to August 30, 1935, inclu- sive. (Tentative tax, 1932 act as amended.) Total taxes imposed by 1926 act and by 1935 act as amend- ed by 1934 act.		(3) In effect from 5 p.m. East- ern standard time, June 6, 1932, to May 10, 1934, in- clusive. (Tentative tax, 1932 act.) Total taxes imposed by 1926 act and by 1932 act.		(4) In effect after 10:25 a.m., eastern standard time, Feb. 26, 1926. Revenue Act of 1926.	
		Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent	Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent	Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent	Tax on amount in column (A)	Rate of tax on excess over amount in column (A) Percent
	\$10,000		2		1		1		1
10,000	20,000	\$200	4	\$100	2	\$100	2	\$100	1
20,000	30,000	600	6	300	3	300	3	200	1
30,000	40,000	1,200	8	600	4	600	4	300	1
40,000	50,000	2,000	10	1,000	5	1,000	5	400	1
50,000	70,000	3,000	12	1,500	7	1,500	7	500	2
70,000	100,000	5,400	14	2,900	9	2,900	7	900	2
100,000	200,000	9,600	17	5,600	12	5,000	9	1,500	3
200,000	400,000	26,600	20	17,600	16	14,000	11	4,500	4
400,000	600,000	66,600	23	49,600	19	36,000	13	12,500	5
600,000	800,000	112,600	26	87,600	22	62,000	15	22,500	6
800,000	1,000,000	164,600	29	131,600	25	92,000	17	34,500	7
1,000,000	1,500,000	222,600	32	181,600	28	126,000	19	48,500	8
1,500,000	2,000,000	382,600	35	321,600	31	221,000	21	88,500	9
2,000,000	2,500,000	557,600	38	476,600	34	326,000	23	133,500	10
2,500,000	3,000,000	747,600	41	646,600	37	441,000	25	183,500	11
3,000,000	3,500,000	952,600	44	831,600	40	566,000	27	238,500	12
3,500,000	4,000,000	1,172,600	47	1,031,600	43	701,000	29	298,500	13
4,000,000	4,500,000	1,407,600	50	1,246,600	46	846,000	31	363,500	14
4,500,000	5,000,000	1,657,600	53	1,476,600	48	1,001,000	33	433,500	14
5,000,000	6,000,000	1,922,600	56	1,716,600	50	1,166,000	35	503,500	15
6,000,000	7,000,000	2,482,600	59	2,216,600	52	1,516,000	37	653,500	16
7,000,000	8,000,000	3,072,600	61	2,736,600	54	1,886,000	39	813,500	17
8,000,000	9,000,000	3,682,600	63	3,276,600	56	2,276,000	41	983,500	18
9,000,000	10,000,000	4,312,600	65	3,836,600	58	2,686,000	43	1,163,500	19
10,000,000	20,000,000	4,962,600	67	4,416,600	60	3,116,000	45	1,353,500	20
20,000,000	50,000,000	11,662,600	69	10,416,600	60	7,616,000	45	3,353,500	20
50,000,000	.....	32,362,600	70	28,416,600	60	21,116,000	45	9,353,500	20

(Petitioner's and Respondent's Exhibit A-1—
Continued)

(Space for Use of Bureau)

Tax on Return or Deficiency	Amount	Assessments			Date	Payments	
		List	Page	Line		Principal	Interest
Ret Est Tax	\$8826.05	Oct '39	104	0	10-19-39	\$8826.05	

Determination by Bureau

In the Name of God, Amen:

I, Adolph J. Koch, of the County of Santa Clara, State of California, being of sound mind and disposing memory, and mindful of the uncertain duration of human life, do hereby make, publish and declare the following to be my Last Will and Testament, that is to say:

I.

I give and bequeath unto my brother Karl Koch of Denver, Colorado, the sum of \$5000.00.

In the event that my brother Karl Koch should not be living at my death, then I give and bequeath unto his wife Wanda Koch the sum of \$5000.00.

II.

I give and bequeath unto my sister-in-law Mollie Koch the sum of \$1000.00, provided she be living at my death.

III.

I give and bequeath unto my niece Daisy Koch of San Francisco, California, the sum of \$1000.00.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

IV.

One-half of all the rest and residue of my property of every kind and nature, and wheresoever situate, I give, devise and bequeath unto my son George A. Koch.

V.

The other one-half of all the residue of my property of every kind and nature, and wheresoever situate, I give, devise and bequeath unto my son
should

George A. Koch, and in case he ~~could~~ die, or should refuse or be incapacitated to act, then unto my son-in-law James B. Swickard, in trust, however, to manage the real estate, with power to lease the same, to remodel or repair the buildings or other improvements thereon, to sell said real property, and to do such other things as he may consider necessary or proper, and to loan out the income therefrom together with the income from all personal property and any other moneys of said trust in his hands at any time, or invest the same in mortgages or deeds of trust on real estate, or pledges of real property, or in stocks, bonds or other income producing property, and to pay out of the income of such properties such moneys as he may deem necessary in his discretion for the support, education and maintenance of my grandson Ralph Swickard, until my said grandson shall reach the age of twenty-one years, and

(Petitioner's and Respondent's Exhibit A-1—
Continued)

when my said grandson shall reach the age of twenty-one years, to deliver to my said grandson one-fourth of all the trust property then remaining in the hands of my said trustee, to be his absolutely, free of any trust, and to pay one-half of all the income of the remaining trust property quarterly to my said grandson Ralph Swickard until he shall reach the age of twenty-five years, and upon my said grandson reaching the age of twenty-five years then my said trustee is to deliver one-half of all said trust property then remaining in his hands to my said grandson, to be his free from any trust, and to pay all the net income of the trust property remaining in his hands to my grandson until he shall reach the age of thirty years.

I hereby authorize my said trustee, however, if he deem it advisable, and at his sole discretion, to deliver all the said trust property unto my said grandson when he shall reach the age of twenty-five years, and upon the delivery unto my said grandson of all the said property said trust shall cease. If my said trustee does not exercise this discretion, then upon my said grandson reaching the age of thirty years said trust shall cease and terminate and all of the trust property then remaining in the hands of my said trustee shall go, belong and be turned over to my said grandson Ralph Swickard, to be his absolutely, free from any trust.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Should my grandson Ralph Swickard die before reaching the age of twenty-one years, leaving a child or children, then said trust shall cease and all said trust property shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die before reaching the age of twenty-one years leaving no children surviving him, then on his said death said trust shall cease and terminate and all said trust property shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares, share and share alike. And should my son George A. Koch be not living at that time then all said trust property shall go, belong and be turned over to my grandson Kenneth Koch. And should Kenneth Koch die before that time leaving a child or children surviving him then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my grandson Kenneth Koch be not living at that time and no child of Kenneth Koch be surviving then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch

(Petitioner's and Respondent's Exhibit A-1—

Continued)

and Valentine Koch to be divided equally among them, share and share alike.

Should my grandson Ralph Swickard die after reaching the age of twenty-one years but before reaching the age of twenty-five years, leaving a child or children then said trust shall cease and all said trust property then remaining in the hands of my said trustee shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die after reaching the age of twenty-one years but before reaching the age of twenty-five years, leaving no child surviving him then on his said death said trust shall cease and terminate and all said trust property then remaining shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares, share and share alike. Should, however, my son George A. Koch be not living at that time then all said trust property shall go belong and be turned over to my grandson Kenneth Koch, and should Kenneth Koch die before that time leaving a child or children surviving him then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my

(Petitioner's and Respondent's Exhibit A-1—
Continued)

grandson Kenneth Koch be not living at that time and no child of Kenneth Koch be surviving, then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch and Valentine Koch, to be divided equally among said children share and share alike.

Should my grandson Ralph Swickard die after reaching the age of twenty-five years but before reaching the age of thirty years, leaving a child or children, then said trust shall cease and all said trust property then remaining in the hands of said trustee shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die after reaching the age of twenty-five years but before reaching the age of thirty years, no child surviving him, then on his death said trust shall cease and all said trust property remaining shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares. And should Kenneth Koch die before that time leaving a child or children surviving then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him, and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my grandson Kenneth Koch be not living at that time and no child or

(Petitioner's and Respondent's Exhibit A-1—
Continued)

children of Kenneth Koch be surviving, then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch and Valentine Koch, to be divided equally among said children share and share alike.

Said trustee shall have all other powers hereinafter given him by the terms of this Will or that may be necessary or proper to carry out the terms of said trust.

VI.

The interest of my grandson Ralph Swickard, and all of the beneficiaries of the trust hereinbefore set forth, is hereby created inalienable, and it is particularly provided that the said Ralph Swickard, or any other beneficiary under said trust named, shall be without the right, power or authority to sell, pledge, mortgage or in any other manner to encumber, anticipate, or impair his beneficial interest in the trust or any part thereof. And no part of the income or principal of the trust shall be subject to the claims of any creditor or any beneficiary, nor liable to attachment or execution, or any other process of law, and every distribution of income or principal shall be made only to the beneficiary entitled to receive the same according to the terms of this trust, and upon the delivery to the trustee of the receipt of such beneficiary or his legal representative, it being hereby declared that all payments of said trust directed to be made

(Petitioner's and Respondent's Exhibit A-1—
Continued)

to my beneficiary Ralph Swickard, or any other beneficiary, are intended to be personal and shall not be made to any assignee of his, either by voluntary assignment by him or by assignment by operation of law.

VII.

I authorize and empower the trustee in this Will mentioned, or his successor, in his sole discretion:

(a) To retain the stocks, bonds or other investments, if any, which are respectively received by him from my Executor, although not of the character authorized by the laws of California for trust investments, or to dispose of or change any or all of such investments or any other securities which at any time form a part of said trust estate:

(b) To vote in person or by proxy upon all stocks or other securities held by the trustee:

(c) To exchange the securities of any corporation or company for other securities issued by the same or any other corporation or company at such times and upon such terms and conditions as said trustee in his discretion may deem proper:

(d) To consent to the reorganization, consolidation or merger of any corporation or company, or to the sale or lease of his or its property, or any portion thereof, to such corporation or company and upon such reorganization, consolidation, merger, sale or lease, to change securities held by the trustee for the securities issued in connection therewith:

(Petitioner's and Respondent's Exhibit A-1—
Continued)

(e) To pay all assessments, subscriptions and other sums of money as the trustee may deem expedient for the protection of the interests of the trust estate as holder of any stocks, bonds and other securities of any corporation or company, and to exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities, or to take advantage of any rights to subscribe for additional stocks, bonds, or other securities, and to make any and all necessary payments therefor:

(f) To sell and convey at private sale, and to lease and exchange all or any part of the respective trust estates, both real and personal, at such times and at such prices and on such conditions as such trustee may deem best in order to carry out the provisions of this Will, and in this connection I give and grant him full power and authority to execute and deliver proper conveyances and transfers of said property both real and personal:

(g) In any case in which said trustee is required, pursuant to the provisions of this Will, to divide any portion of my estate into parts or shares, or to distribute the same, I authorize him in his discretion to make such division or distribution in kind or part in kind and part in money, and for the purpose of such allotment the judgment of such trustee concerning the propriety thereof and the respective values for the purpose

(Petitioner's and Respondent's Exhibit A-1—
Continued)

of distribution of the securities so allotted, shall be binding and conclusive on all persons interested in my estate:

(h) In case of securities taken or purchased for any of the trust funds at a premium the trustee hereof is not required to set aside any part of the income thereof as a sinking fund to retire or absorb such premium, or to make any other provision for depreciation in the value of the securities constituting any of the trust funds by reason of the approaching maturity of such securities or otherwise.

VIII.

I hereby nominate and appoint my son George A. Koch as the Executor of this my Will and I direct that no bond or other security be required of my said Executor, or as trustee hereunder, for the faithful performance of his duties as such, or on any sale hereunder.

IX.

I hereby give my said Executor full power and authority:

(a) To sell, lease and exchange all or any part of my estate both real and personal, at such prices and on such conditions as he may deem best:

(b) To settle or compromise any or all claims by or against my estate on such terms as he in his sole discretion may deem proper:

(c) To turn over as part of the shares of my

(Petitioner's and Respondent's Exhibit A-1—
Continued)

estate hereinabove devised or bequeathed, any stocks, bonds or other investments in which, at the time of my death, any property of my estate shall be invested, although not of the character authorized by the laws of the State of California for trust investments:

(d) To exchange the securities of any corporation or company for other securities issued by the same or any other corporation or company, at such times and upon such terms and conditions as he may in his sole discretion deem proper:

(e) To consent to the reorganization, consolidation or merger of any corporation or company, or to the sale or lease of its property, or any portion thereof, to any person, corporation or company, or to the lease by any person, corporation or company, of his or its property, or any portion thereof, to such corporation or company, and upon such reorganization, merger, sale, or lease, to exchange the securities held by him for the securities issued in connection therewith:

(f) To pay all assessments, subscriptions and other sums of money as he may deem expedient for the protection of the interests of my estate as the holder of any stocks, bonds or other securities of any corporation or company, and to exercise any option contained in any stocks, bonds or other securities for the conversion of the same into other securities, or to take advantage of any rights to subscribe for additional stocks, bonds, or other

(Petitioner's and Respondent's Exhibit A-1—
Continued)

securities, and to make any and all necessary payments therefor.

X.

I hereby revoke all former Wills by me made.

In Witness Whereof I have hereunto set my hand this 25th day of July, A.D. 1935.

ADOLPH J. KOCH

The foregoing instrument consisting of nine pages including this, was at the day it bears date, signed by the estator, Adolph J. Koch, in our presence, and was by him then and there declared to us to be his Last Will and Testament and we, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names and residences as witnesses thereto.

JOHN H. DREW,

residing at San Jose, California.

PAUL S. WILLIAMS

residing at San Jose, California.

CODICIL

I, Adolph J. Koch, hereby make, publish and declare the following to be a codicil to my foregoing Last Will and Testament dated July 25, 1935, that is to say:

I.

I hereby republish my said Will dated July 25, 1935 in all of its parts except as herein modified by this codicil.

(Petitioner's and Respondent's Exhibit A-1—
Continued)

II.

The one-half of all my property disposed of in Paragraph V of my said Will, I hereby give, devise and bequeath as follows:

The other one-half of all the residue of my property of every kind and nature, and wheresoever situate, I give, devise and bequeath unto my son George A. Koch, and in case he should die or should refuse or be incapacitated to act, then unto my son-in-law James B. Swickard, in trust, however, to manage the real estate, with power to lease the same, to remodel or repair the buildings or other improvements thereon, to sell said real property, and to do such other things as he may consider necessary or proper, and to loan out the income therefrom together with the income from all personal property and any other moneys of said trust in his hands at any time, or invest the same in mortgages or deeds of trust on real estate, or pledges of real property, or in stocks, bonds or other income producing property, and to pay out of the income of such properties such moneys as he may deem necessary in his discretion for the support, education and maintenance of my grandson Ralph Swickard, until my said grandson shall reach the age of twenty-five years, and when my said grandson shall reach the age of twenty-five years, to deliver to my said grandson one-fourth of all the trust property then remaining in the hands of my said trustee, to be his absolutely, free of any trust, and

(Petitioner's and Respondent's Exhibit A-1—
Continued)

to pay one-half of all the income of the remaining trust property quarterly to my said grandson Ralph Swickard until he shall reach the age of thirty years, and upon my said grandson reaching the age of thirty years then my said trustee is to deliver one-half of all said trust property then remaining in his hands to my said grandson, to be his free from any trust, and to pay all the net income of the trust property remaining in his hands to my said grandson until he shall reach the age of thirty-five years.

I hereby authorize my said trustee, however, if he deem it advisable, and at his sole discretion, to deliver all the said trust property unto my said grandson when he shall reach the age of thirty years, and upon the delivery unto my said grandson of all the said property said trust shall cease. If my said trustee does not exercise this discretion, then upon my said grandson reaching the age of thirty-five years said trust shall cease and terminate and all of the trust property then remaining in the hands of my said trustee shall go, belong and be turned over to my said grandson Ralph Swickard, to be his absolutely, free from any trust.

Should my grandson Ralph Swickard die before reaching the age of twenty-five years, leaving a child or children, then said trust shall cease and all said trust property shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die before

(Petitioner's and Respondent's Exhibit A-1—
Continued)

reaching the age of twenty-five years leaving no children surviving him, then on his said death said trust shall cease and terminate and all said trust property shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares, share and share alike. And should my son George A. Koch be not living at that time then all said trust property shall go, belong and be turned over to my grandson Kenneth Koch. And should Kenneth Koch die before that time leaving a child or children surviving him then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my grandson Kenneth Koch be not living at that time and no child of Kenneth Koch be surviving, then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch and Valentine Koch to be divided equally among them, share and share alike.

Should my grandson Ralph Swickard die after reaching the age of twenty-five years but before reaching the age of thirty years, leaving a child or children, then said trust shall cease and all said trust property then remaining in the hands of my

(Petitioner's and Respondent's Exhibit A-1
Continued)

said trustee shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die after reaching the age of twenty-five years but before reaching the age of thirty years, leaving no child surviving him then on his said death said trust shall cease and terminate and all said trust property then remaining shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares, share and share alike. Should, however, my son George A. Koch be not living at that time then all said trust property shall go, belong and be turned over to my grandson Kenneth Koch, and should Kenneth Koch die before that time leaving a child or children surviving him then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my grandson Kenneth Koch be not living at that time and no child of Kenneth Koch be surviving, then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch and Valentine Koch, to be divided equally among said children share and share alike.

(Petitioner's and Respondent's Exhibit A-1
Continued)

Should my grandson Ralph Swickard die after reaching the age of thirty years but before reaching the age of thirty-five years, leaving a child or children, then said trust shall cease and all said trust property then remaining in the hands of said trustee shall go, belong and be turned over to said child or children free from any trust. Should my said grandson die after reaching the age of thirty years but before reaching the age of thirty-five years, no child surviving him, then on his said death said trust shall cease and all said trust property remaining shall go, belong and be turned over to my son George A. Koch and my grandson Kenneth Koch in equal shares. And should Kenneth Koch die before that time leaving a child or children surviving then all said trust property shall go, belong and be turned over to said child or children. Should Kenneth Koch die before that time leaving no child or children surviving him, and my son George A. Koch should still be living, then all said trust property shall go, belong and be turned over to my son George A. Koch. Should, however, both my son George A. Koch and my grandson Kenneth Koch be not living at that time and no child or children of Kenneth Koch be surviving, then all said trust property shall go, belong and be turned over to the children of my brothers Fred Koch, Karl Koch and Valentine Koch, to be divided equally among said children share and share alike.

Said trustee shall have all other powers herein-

(Petitioner's and Respondent's Exhibit A-1
Continued)

above given him by the terms of my said Will, or that may be necessary or proper to carry out the terms of said trust.

In Witness Whereof, I have hereunto set my hand this 3rd day of March, 1937.

ADOLPH J. KOCH

The foregoing instrument consisting of six pages including this, was at the day it bears date signed by the testator, Adolph J. Koch, in our presence, and was by him then and there declared to us to be a Codicil to his Last Will and Testament, and we, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names and residences as witnesses thereto.

PAUL S. WILLIAMS

residing at San Jose, California

JOHN H. DREW

residing at San Jose, California

[Endorsed]: Filed Jul 14 1939

Dec. 24 1938

In lieu of the \$1000 bequest in my will to my brothers widow Mrs. Valentine Koch I have this day given to her the \$1000 as an advancement and in payment of said bequest in my lifetime.

A. J. KOCH

GEORGE A. KOCH

FABER L. JOHNSTON

Witnesses

(Petitioner's and Respondent's Exhibit A-1—
Continued)

Jan 18 1939

In lieu of the 1000.00 bequest in my will to my brothers daughter Daisy Koch I have this day given her the 1000.00 as an advancement and in payment of said bequest in my lifetime.

A. J. KOCH

MRS ANGIE COMPTON

Witness

GEORGE A. KOCH

February 9, 1939

In lieu of the \$5,000.00 bequest in my will to my brother, Karl Koch, which amount I have previously given him, and as covered in his note dated December 1, 1938, is in full payment of said note and as an advancement and in payment of said bequest in my lifetime.

A. J. KOCH

Witnesses

MRS. A. COMPTON

GEORGE A. KOCH

The foregoing instrument is a correct copy of the original filed in this office Sept. 2 1939.

FRANK W. HOGAN

Attest: Sep 27 1939. Frank W. Hogan. County Clerk and ex-officio Clerk of the Superior Court of the State of California and the County of Santa Clara. [Illegible] Deputy.

[Endorsed]: Filed Aug 2, 1939 Frank W. Hogan, Clerk By T. R. Bonetti, Deputy.

(Petitioner's and Respondent's Exhibit A-1
Continued)

This Trust Agreement, made and entered into this 20th day of December, 1938, by and between A. J. Koch, widower, called hereinafter Trustor, and George A. Koch, called hereinafter Trustee:

Witnesseth: That in consideration of the trusts, covenants and agreements hereinafter set forth the Trustor has transferred, assigned and delivered to the Trustee certain personal properties and securities which said personal property is particularly described in Schedule A hereunto attached and made a part hereof:

It is understood and agreed that the Trustee has received and accepted the said personal property, to hold the said personal property and all the income received therefrom in trust for my grandson Ralph J. Swickard, to manage the same and to loan out the income therefrom and any other moneys in said trust in his hands at any time or invest the same in mortgages or deeds of trust on real estate, or in stocks, bonds or other income producing property and to pay out of such income such amount of moneys as the Trustee may deem necessary in his discretion for the support, education and maintenance of my grandson Ralph J. Swickard until my said grandson shall reach the age of twenty-one years: And when my said grandson shall reach the age of twenty-one years to pay all of said income quarterly to my said grandson Ralph J. Swickard

(Petitioner's and Respondent's Exhibit A-1
Continued)

or oftener within the discretion of my said Trustee, until he shall reach the age of twenty-five years: And on my said grandson reaching such age said trust shall cease and terminate and all said trust property then remaining in the hands of my said Trustee shall go, belong and be turned over to my grandson Ralph J. Swickard to be his absolutely free of any trust.

Should my said grandson die before reaching the age of twenty-five years leaving a child or children then said trust shall cease and all said trust property shall go, belong and be turned over to said child or children free of any trust: Should my said grandson die before reaching the age of twenty-five years leaving no child or children surviving him then on his said death said trust shall cease and all said trust property shall go, belong and be turned over to my son George A. Koch, and should my said son George A. Koch be not living at that time then all said trust property shall go, belong and be turned over to my grandson Kenneth Koch.

My said Trustee is hereby authorized and empowered to manage, control and collect the income from all the securities covered by this trust and in his hands at any time and to exchange said securities, if in his discretion he deems it best so to do, and to do all other things that may be necessary to properly manage, control and conserve the said trust property.

(Petitioner's and Respondent's Exhibit A-1
Continued)

In Witness Whereof the parties hereto have executed these presents.

A. J. KOCH

Trustor

GEORGE A. KOCH

Trustee

Schedule A

5—\$1000 Consolidated Edison of New York, 3½% debentures, due 1948.

10—\$1000 P. G. & E. 3½% bonds, Series I, due 1966.

10—\$1000 Am. Tel. & Tel. 3½% debentures, due 1961.

100 shares of common stock of American Tel. & Tel. Certificate No. QG84819.

\$10,000.00 Savings account deposit in The First National Bank of San Jose, California.

\$5,000.00 Independent Building-Loan Association certificate, of San Jose, California.

100	shares	common	stock	of	Byron	Jackson	Co.,	Cert.	B25813
100	"	"	"	"	"	"	"	"	B26187
100	"	"	"	"	"	"	"	"	9759
100	shares	1st	pf.	Pacific	Gas	&	Electric	Co.,	Cert. 5½% C6192
100	"	"	"	"	"	"	"	"	5½% C6193
100	"	"	"	"	"	"	"	"	6% 25690
100	"	"	"	"	"	"	"	"	6% 25691
100	"	"	"	"	"	"	"	"	6% 25692

[Endorsed]: U.S.T.C. Filed Nov. 21, 1942

SAN JOSE, CAL.

Nov. 8th

1938

No.

THE FIRST NATIONAL BANK OF SAN JOSE, CAL.

90-78

12

PAY TO
THE ORDER OF

Paul Koch

\$1500⁰⁰

= Fifteen hundred

DOLLARS

A Koch

THE TAX COURT OF THE U.S.
DIV. II DOCKET 13700
ADMITTED IN EVIDENCE
NOV 21 1942
PETITIONER'S EXHIBIT
RESPONDENT'S

Pay to the order of any Bank or Banker or
through the Salt Lake City Clearing House
ALL PRIOR ENDORSEMENTS GUARANTEED
DEC 1 1938

*I will check
the deposit only
to my account
the day I find*

SAN JOSE, CAL.

Sept 21st

1938

No.

THE FIRST NATIONAL BANK OF SAN JOSE, CAL.

90-78

12

PAY TO
THE ORDER OF

Ralph Swickard

\$500⁰⁰

Five hundred & no/100

DOLLARS

A J Koch

602-542

THE TAX COURT OF THE U.S.
DIV. II DOCKET 105007
ADMITTED IN EVIDENCE
NOV 21 1942
PETITIONER'S EXHIBIT
RESPONDENT'S

Ralph Swick

602-542

SAN JOSE, CAL. *Oct 24* 1938 No.

THE FIRST NATIONAL BANK OF SAN JOSE, CAL. 90-78
12

PAY TO THE ORDER OF *Elworthy Company* \$5164⁵⁸/₁₀₀

Five thousand one hundred sixty four and 58/100 DOLLARS

A J Koch

991

THE TAX COURT OF THE U. S.
DIV. 11 DOCKET 108007
ADMITTED IN EVIDENCE
NOV 21 1942
PETITIONER'S EXHIBIT 10
RESPONDENT'S

PAY TO THE ORDER OF
BY BANK OR BANKER
OCT 25 1938
AMERICAN TRUST COMPANY
CORPORATION OF THE STATE OF CALIFORNIA
SAN FRANCISCO

PAY TO THE ORDER OF
AMERICAN TRUST COMPANY
SAN FRANCISCO, CALIF.
ELWORTHY & CO

222

SAN JOSE, CAL. *Oct 31* 1938 No.

THE FIRST NATIONAL BANK OF SAN J. CAL. 90-78
12

PAY TO THE ORDER OF *Roy P. Emerson Tax Col* \$488⁸⁷/₁₀₀

Four Hundred Eighty eight and 87/100 DOLLARS

A J Koch

KK1

THE TAX COURT OF THE U. S.
DIV. 11 DOCKET 108007
ADMITTED IN EVIDENCE
NOV 21 1942
PETITIONER'S EXHIBIT 11
RESPONDENT'S

ROY P. EMERSON
TAX COLLECTOR, SANTA CLARA COUNTY
ED. & P. FERGUSON
DEPUTY TAX COLLECTOR
NOV-7-38

NOV - 9 1938
AMERICAN TRUST COMPANY
SAN FRANCISCO, CALIF.

KK2

In the U. S. Circuit Court of Appeals
for the Ninth Circuit

B.T.A. Docket No. 108007

In the Matter of the Estate of
ADOLPH J. KOCH, George A. Koch, Executor,
Petitioner on Review,
vs.

GUY T. HELVERING, Commissioner of Internal
Revenue,
Respondent on Review.

PETITION FOR REVIEW AND ASSIGN-
MENTS OF ERROR

To The Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

Now comes George Koch, Executor of the Estate
of George A. Koch, by his attorney Gerald S.
Chargin, Esq. of San Jose, California and respect-
fully shows:

I.

JURISDICTION

That the petitioner on review is the duly ap-
pointed, qualified and acting executor of the Estate
of Adolph J. Koch, deceased (hereinafter referred
to as the taxpayer) and his address is Hotel
Durant, Durant and Bowditch Streets, Berkeley,
California; that the respondent on review is [280]
the duly appointed, qualified and acting Commis-
sioner of Internal Revenue (hereinafter referred

to as the Commissioner) under the authority of the laws of the United States; that the taxpayer filed a federal estate tax return on October 19, 1939 with the Collector of Internal Revenue for the first district of California, which office is within the jurisdiction of this Honorable Court; that the Court in which the review of this case is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

Taxpayer files this petition for review pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

II.

NATURE OF CONTROVERSY

The nature of the controversy is as follows, to wit:

This proceeding involves a deficiency in federal estate tax of \$22,544.18. Respondent determined that certain transfers made by the decedent within two years prior to his death of property having an aggregate value of \$204,442.51 were made in contemplation of death and included this amount in the gross estate of decedent under sections 811 (c) and 811 (d) of the Internal Revenue Code.

The decedent Adolph J. Koch died on June 29, 1939 at the age of 84 years of age. On December 20, 1938 he had made a gift in trust to his grandson Ralph of properties valued on the date of his death at \$79,001.53 for the purpose of making the boy absolutely independent of his stepmother and father and to make sure that he got an education at Stan-

ford University and could later establish himself in business. This gift in trust under section 2280 of the California Civil Code was subject [281] to a power of the decedent to revoke the trust since the trust was not made specifically irrevocable. During the month of January 1939 he made further gifts to Ralph valued on the date of his death at \$21,000. On those same occasions he made several gifts of properties outright to his son George valued at \$79,290.98 and \$21,000, respectively to equalize the gifts to the grandson and in pursuance of a long standing policy of liberal dealing with his son.

The decedent paid federal gift taxes on these gifts in the amount of \$7,547.06 for 1938 and \$5,374.12 for 1939. After making these gifts, the decedent had cash and properties left of an aggregate value of \$142,605.39.

Petitioner on review contends that these gifts were not made in contemplation of death, that the decedent who was in good health for a man of that age made the gifts because of motives associated with life which he disclosed in his statements to his closest associates and relative.

The Respondent and this Court have held that the gifts were "substitutes for testamentary dispositions of decedent's property" and have required their inclusion in the gross estate of decedent with a resultant deficiency of \$22,544.18.

III.

ASSIGNMENTS OF ERROR

The taxpayer, being aggrieved by the findings of facts and conclusions of law contained in the decision of the United States Tax Court and by its final order determining a deficiency in Federal estate tax in the amount of \$22,544.18 desires to obtain a review by the United States Circuit Court of Appeals for the Ninth Circuit. [282]

The taxpayer's assignments of error are as follows:

(1) The Court erred in that there was no substantial evidence to sustain the finding that the transfers were made in contemplation of death.

(2) The Court erred in that the facts found do not sustain the conclusions of law and the decision which it reached.

(3) The Court erred in that it incorrectly applied the law applicable to the facts.

(4) The Court erred in failing to find as a fact that decedent reserved a power to change, alter, amend and revoke the trust for the grandson Ralph.

(5) The Court erred in that it made inadequate findings of fact in the following respects:

(a) The Court erred in failing to find as a fact that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he was making the gift to his grandson Ralph because he wanted the boy to be independent of his stepmother and father and so that he could go to Stanford and later go into business.

(b) The Court erred in failing to find as a fact that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he was making the gift to his son George because he wanted to equalize the gift to his grandson Ralph and for George to have as much as he had given Ralph.

(c) The Court erred in failing to find as a fact that there had been family conflicts between the decedent's grandson and his stepmother and between the decedent and the boy's stepmother which had made decedent bitter toward the boy's stepmother. [282a]

(d) The Court erred in failing to find as a fact that the decedent bought a new car in 1938 and applied for a license to drive the car which he received and that he then drove the car around both alone and with his friends, on one occasion at least driving from San Jose to San Francisco to see his son.

(e) The Court erred in failing to find during 1938 and 1939 the decedent was very active at the meetings of the Finance Committee of the San Jose Building and Loan Association and went out and examined the properties on which loans were to be made.

(f) The Court erred in failing to find that the decedent at 82 years of age had gone back to active participation as a Director and Vice President of the San Jose Building and Loan Association at the request of the Board of Directors.

(g) The Court erred in failing to find that on

December 21, 1938, the day after he had made two of the gifts, he attended a meeting of the Directors of the San Jose Building and Loan Association at which he made a motion to accept repayment of a loan totaling over \$500,000 without the payment of a penalty for prepayment, that he led the discussion and the proposal was carried.

(h) The Court erred in failing to find that if the decedent did suffer a stroke on May 18, 1938 he was not informed of the fact by the attending physician or any one else and that he never knew he had suffered one.

(i) The Court erred in failing to find that the decedent declared and believed that he would live to be a hundred years of age and would outlive his son-in-law and the others.

(j) The Court erred in failing to find that the decedent up to date of his death attended personally to all the details [282b] of his business affairs, purchased stocks and bonds, drew his own checks, paid taxes, etc.

(6) The Court erred in finding as a fact that on May 18, 1938 the decedent had a paralytic stroke.

(7) The Court erred in finding that the decedent was pretty much of an invalid at any time as a result of the automobile injury or the alleged paralytic stroke or from any other cause.

(8) The Court erred in finding as a fact that the transfers by the decedent were made in contemplation of death.

(9) The Court erred as a matter of law in hold-

ing that these transfers were made in contemplation of death.

(10) The Court erred as a matter of law in completely disregarding the decedent's own declarations as to the reasons he was making the gifts.

(11) The Court erred in failing to find that these transfers were made through motives associated with life.

(12) The Court erred in entering its final order of redetermination on April 14, 1943 that there is a deficiency in estate tax of \$22,544.18.

Wherefore, taxpayer petitions that the decision of the Tax Court be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of record be prepared in accordance with the rules of said Court and transmitted to the Clerk of said Court for filing and that proper action be taken to the end that the errors complained of may be reviewed by said Court and the findings, decision, opinion and order of the Tax Court reversed and set aside.

GERALD S. CHARGIN

Attorney for Taxpayer

First National Bank Building,
San Jose, California

[Endorsed]: U.S.T.C. Filed June 29, 1943 [283]

State of California

Santa Clara County—ss.

Gerald S. Chargin being duly sworn says that he is the attorney for the taxpayer herein and as such is duly authorized to verify the foregoing petition for review; that he has read said petition

and is familiar with the contents thereof, that said petition is true of his own knowledge except as to matters therein alleged as information and belief, and as to those matters he believes it to be true.

GERALD S. CHARGIN

Sworn and subscribed to before me this 21st day of June, A. D. 1943.

[Seal]

VICTOR A. CHARGIN

Notary Public [284]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To J. P. Wenchel
Chief Counsel
Bureau of Internal Revenue
Washington, D. C.

You are hereby notified that George A. Koch, Executor of the Estate of Adolph J. Koch, did, on the 29th day of June 1943 file with the Clerk of the U. S. Tax Court at Washington, D. C. a petition for review by the U. S. Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 29th day of June, A. D. 1943.

GERALD S. CHARGIN

First National Bank Bldg.,
San Jose, Calif.

Service of copy of petition for review, praecipe for record, and statement of points acknowledged June 29, 1943.

J. P. WENCHEL

Atty for Respondent.

[Endorsed]: U.S.T.C. Filed June 29, 1943. [285]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS

Now comes George A. Koch, Executor of the Estate of Adolph J. Koch, the Petitioner on review herein by his attorney Gerald S. Chargin and hereby asserts the following errors on which he intends to rely on this review: [286]

The taxpayer's assignments of error are as follows:

(1) The Court erred in that there was no substantial evidence to sustain the finding that the transfers were made in contemplation of death.

(2) The Court erred in that the facts found do not sustain the conclusions of law and the decision which it reached.

(3) The Court erred in that it incorrectly applied the law applicable to the facts.

(4) The Court erred in failing to find as a fact

that decedent reserved a power to change, alter, amend and revoke the trust for the grandson Ralph.

(5) The Court erred in that it made inadequate findings of fact in the following respects:

(a) The Court erred in failing to find as a fact that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he was making the gift to his grandson Ralph because he wanted the boy to be independent of his stepmother and father and so that he could go to Stanford and later go into business.

(b) The Court erred in failing to find as a fact that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he was making the gift to his son George because he wanted to equalize the gift to his grandson Ralph and for George to have as much as he had given Ralph.

(c) The Court erred in failing to find as a fact that there had been family conflicts between the decedent's grandson and his stepmother and between the decedent and the boy's stepmother which had made decedent bitter toward the boy's stepmother. [287]

(d) The Court erred in failing to find as a fact that the decedent bought a new car in 1938 and applied for a license to drive the car which he received and that he then drove the car around both alone and with his friends, on one occasion at least driving from San Jose to San Francisco to see his son.

(e) The Court erred in failing to find during 1938 and 1939 the decedent was very active at the meetings of the Finance Committee of the San Jose Building and Loan Association and went out and examined the properties on which loans were to be made.

(f) The Court erred in failing to find that the decedent at 82 years of age had gone back to active participation as a Director and Vice President of the San Jose Building and Loan Association at the request of the Board of Directors.

(g) The Court erred in failing to find that on December 21, 1938, the day after he made two of the gifts, he attended a meeting of the Directors of the San Jose Building and Loan Association at which he made a motion to accept repayment of a loan totaling over \$500,000 without the payment of a penalty for prepayment, that he led the discussion and the proposal was carried.

(h) The Court erred in failing to find that if the decedent did suffer a stroke on May 18, 1938 he was not informed of the fact by the attending physician or any one else and that he never knew he had suffered one.

(i) The Court erred in failing to find that the decedent declared and believed that he would live to be a hundred years of age and would outlive his son-in-law and the others.

(j) The Court erred in failing to find that the decedent up to the date of his death attended personally to all the details of his [288] business af-

fairs, purchased stocks and bonds, drew his own checks, paid taxes, etc.

(6) The Court erred in finding as a fact that on May 18, 1939 the decedent had a paralytic stroke.

(7) The Court erred in finding that the decedent was pretty much of an invalid at any time as a result of the automobile injury or the alleged paralytic stroke or from any other cause.

(8) The Court erred in finding as a fact that the transfers by the decedent were made in contemplation of death.

(9) The Court erred as a matter of law in holding that these transfers were made in contemplation of death.

(10) The Court erred as a matter of law in completely disregarding the decedent's own declarations as to the reasons he was making the gifts.

(11) The Court erred in failing to find that these transfers were made through motives associated with life.

(12) The Court erred in entering its final order of redetermination on April 14, 1943 that there is a deficiency in estate tax of \$22,544.18.

The Court erred in that its decision was contrary to law.

GERALD S. CHARGIN

Attorney-for-Petitioner

First National Bank Building,
San Jose, California

[Endorsed]: U.S.T.C. Filed June 29, 1943.

[288a]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
OF REVIEW

To the Clerk of the U. S. Tax Court:

You will please prepare, transmit and deliver to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the taxpayer.

[289]

1. Docket entries of all proceedings before the Board.

2. Pleadings before the Board:

(a) Petition including copy of deficiency letter.

(b) Answer.

4. Findings of fact, memorandum, opinion, decision of Tax Court dated April 13, 1943 and its order of redetermination dated April 14, 1943.

5. Complete transcript of the evidence adduced and the proceedings before the Tax Court on the hearing of the case on November 21, 1942.

6. Taxpayer's petition for review together with proof of service of notice of filing petition for review.

7. Statement of points to be relied upon.

8. The designation of contents of record on review.

Said transcript is to be prepared, certified and

transmitted as required by law and the rule of the United States Circuit Court of Appeals for the Ninth Circuit.

GERALD S. CHARGIN

Attorney for Petitioner on
Review

First National Bank Build-
ing, San Jose, California.

[Endorsed]: U.S.T.C. Filed June 29, 1943. [290]

The Tax Court of the United States
Washington

Docket No. 108007

ESTATE OF ADOLPH J. KOCH, GEORGE A.
KOCH, Executor,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 290, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand

and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 15th day of July, 1943.

[Seal]

B. D. GAMBLE,

Clerk, The Tax Court of the
States.

[Endorsed]: No. 10506. United States Circuit Court of Appeals for the Ninth Circuit. George A. Koch, Executor of the Estate of Adolph J. Koch, Deceased, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 27, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RESPECTING THE PRINT-
ING OF THE RECORD ON REVIEW

It is hereby stipulated by the parties to the above-entitled cause, by their counsel of record, that in the printing of the record Petitioner's Exhibits 2 to 11, both inclusive, and the following parts of the Official Report of the Proceedings before the United States Board of Tax Appeals (now the Tax Court of the United States) shall be omitted:

1. Pages 1 to 5, inclusive, and Lines 1 to 20, inclusive of Page 6.

2. Line 14, Page 16, to and including Line 11, Page 17.

3. Line 5, Page 28, to and including Line 13, Page 29.

4. Lines 24 and 25 of Page 43, Page 44, and Lines 1 to 14, inclusive, of Page 45.

5. Lines 18 to 25, inclusive, of Page 45.

6. Lines 5 to 13, inclusive, of Page 53.

7. Line 15, Page 54, to and including Line 19, Page 55.

8. Line 12, Page 69, to and including Line 11 of Page 70.

9. Line 16, Page 73, to and including Line 7 of Page 74.

10. Lines 12 to 20, inclusive, of Page 80.

11. Line 2, Page 83, to and including Line 7 of Page 84.

12. Lines 20 to 25, inclusive, Page 114, Pages 115, 116 and 117.

13. Lines 1 to 7, inclusive, of Page 118.

14. Lines 19 to 25, inclusive, Page 140 and Line 1, Page 141.

15. Lines 2 to 6 and 11 to 25, both inclusive, of Page 142, Page 143, and Lines 1 and 2 of Page 144.

16. Lines 1 to 17, inclusive, and Line 25 of Page 165, and Pages 166, 167, 168 and 169.

GERALD S. CHARGIN

Attorney for Petitioner on
Review.

SAMUEL O. CLARK JR.

Assistant Attorney General

J. P. WENCHEL

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Attorneys for Respondent on
Review.

[Endorsed]: Filed Aug. 25, 1943. Paul P.
O'Brien, Clerk.

10506
No. 10,606

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE A. KOCH, Executor of the Estate of
Adolph J. Koch, Deceased,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

GERALD S. CHARGIN,

First National Bank Building, San Jose, California,

Attorney for Petitioner.

FILED

NOV 17 1943

PAUL P. O'BRIEN,
CLERK



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No. 10,606

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE A. KOCH, Executor of the Estate of
Adolph J. Koch, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

STATEMENT OF JURISDICTION.

This is a petition to review a decision of the U. S. Tax Court entered on April 14, 1943, in favor of the respondent which determines a deficiency of estate tax in the amount of \$22,544.18. (Tr. p. 25.)

The proceeding in the Tax Court was begun by the filing of a petition on June 28, 1941. (Tr. p. 1.) An amended petition was filed on August 16th. (Tr. pp. 2 to 22.) Respondent's answer was filed on September 3, 1941. (Tr. pp. 2, 23, 24.)

The petitioner on review is the duly appointed, qualified and acting executor of the Estate of Adolph J. Koch, deceased (hereinafter referred to as the tax-

payer) and his address is Hotel Durant, Durant and Bowditch Streets, Berkeley, California.

The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) under the authority of the laws of the United States.

The petitioner filed a federal estate tax return on October 19, 1939 with the Collector of Internal Revenue for the first district of California, which office is within the jurisdiction of this Honorable Court.

The Court in which the review of this case is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioner files this petition for review pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The nature of the controversy is as follows, to wit:

This proceeding involves a deficiency in federal estate tax of \$22,544.18. Respondent determined that certain transfers made by the decedent within two years prior to his death of property having an aggregate value of \$204,442.51 were made in contemplation of death and included this amount in the gross estate of decedent under sections 811 (c) and 811 (d) of the Internal Revenue Code.

The decedent Adolph J. Koch died on June 29, 1939 at the age of 84 years. On December 20, 1938 he had made a gift in trust to his grandson Ralph,

the son of a deceased daughter, of properties valued on the date of his death at \$79,001.53 for the purpose of making the boy absolutely independent of his step-mother and father and to make sure that he got an education at Stanford University and could later establish himself in business. This gift in trust, under section 2280 of the California Civil Code, was subject to a power of the decedent to revoke, as the trust was not made specifically irrevocable. During the month of January 1939 he made further gifts to Ralph valued on the date of his death at \$21,000. On these two occasions he made several gifts of properties outright to his son George valued at \$79,290.98 and \$21,000 respectively to equalize the gifts to the grandson and in pursuance of a long standing policy of liberal dealing with his son.

The decedent paid federal gift taxes on these gifts in the amount of \$7547.06 for 1938 and \$5374.12 for 1939. After making these gifts, the decedent had cash and properties left of an aggregate value of \$142,605.39.

Petitioner on review contends that these gifts were not made in contemplation of death, that the decedent who was in good health for a man of his age made the gifts because of motives associated with life which he disclosed in statements to his attorney, son and closest associates and which were supported by the surrounding circumstances.

With respect to the gift in trust of December 20, 1938, to his grandson there is an additional question as to whether that gift was includible in decedent's

gross estate under section 811 (d) of the Internal Revenue Code because the decedent had a power to revoke, statutorily imposed upon the trust by section 2280 of the California Civil Code.

The Court below has held that the gifts were “substitutes for testamentary dispositions of decedent’s property” and has required their inclusion in the gross estate of decedent with a resultant deficiency of \$22,544.18.

SPECIFICATION OF ERRORS.

The taxpayer’s assignments of error are as follows:

(1) The Court erred in that there was no substantial evidence to sustain the finding that the transfers were made in contemplation of death.

(2) The Court erred in that the facts found do not sustain the conclusions of law and the decision which it reached.

(3) The Court erred in that it incorrectly applied the law applicable to the facts.

(4) The Court erred in failing to find as a fact that decedent reserved a power to change, alter, amend and revoke the trust for the grandson Ralph.

(5) The Court erred in that it made inadequate findings of fact in the following respects:

(a) The Court failed to find that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he

was making the gift to his grandson Ralph because he wanted the boy to be independent of his stepmother and father and so that he could go to Stanford and later go into business.

(b) The Court failed to find that the decedent when the gifts were made told his attorney and his son that he was making the gift to his son George because he wanted to equalize the gift to his grandson Ralph.

(c) The Court failed to find that there had been conflicts between the decedent's grandson and his stepmother and between the decedent and the boy's parents which had made decedent bitter.

(d) The Court failed to find that the decedent bought a new car in 1938 and applied for a license to drive the car and that he then drove the car around, both alone and with his friends.

(e) The Court failed to find that during 1938 and 1939 the decedent was very active at the meetings of the Finance Committee of the San Jose Building and Loan Association and went out and examined the properties on which loans were to be made.

(f) The Court failed to find that the decedent at 82 years of age had gone back to active participation as a director and vice president of the San Jose Building and Loan Association at the request of the board of directors.

(g) The Court failed to find that on December 21, 1938, the day after he had made two of the gifts, he attended a meeting of the directors of the San Jose

Building and Loan Association at which he made a motion which was carried to accept repayment of a loan totaling over \$500,000 without the payment of a penalty for prepayment and led the discussion.

(h) The Court failed to find that, if the decedent did suffer a stroke on May 18, 1938, he was not informed of the fact by the attending physician or any one else.

(i) The Court failed to find that the decedent believed that he would live to be a hundred years of age and would outlive his son-in-law.

(j) The Court failed to find that the decedent up to date of his death attended personally to all the details of his business affairs, purchased stocks and bonds, drew his own checks, paid taxes, etc.

(6) The Court erred in finding that on May 18, 1938 the decedent had a paralytic stroke.

(7) The Court erred in stating that the decedent was pretty much of an invalid at any time as a result of the automobile injury, the alleged paralytic stroke or from any other cause.

(8) The Court erred in finding that the transfers by the decedent were made in contemplation of death.

(9) The Court erred as a matter of law in holding that these transfers were made in contemplation of death.

(10) The Court erred as a matter of law in completely disregarding the decedent's own declarations as to the reasons he was making the gifts.

(11) The Court erred in failing to find that these transfers were made through motives associated with life.

(12) The Court erred in entering its final order of redetermination on April 14, 1943, that there was a deficiency in estate tax of \$22,544.18.

STATUTES INVOLVED.

Section 2280, California Civil Code.

“Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected thereby.”

Section 811, Internal Revenue Code—Gross Estate.

“The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * *

© Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or other-

wise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(d) **Revocable Transfers.** (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or moneys worth) by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power) to alter, amend, revoke or terminate, or where any such power is relinquished in contemplation of decedent's death.

ARGUMENT.**POINT I.**

THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION OF LAW THAT THESE GIFTS WERE MADE IN CONTEMPLATION OF DEATH AND THE COURT APPLIED AN ERRONEOUS PRINCIPLE OF LAW TO THE FACTS.

- (a) The Court below overlooked the fact that the decedent retained a power to revoke the December 20, 1938 trust.

The Court below found that "no power to change, alter or amend the trust was reserved in the settlor" (Tr. p. 29), completely overlooking the fact that one of the Commissioner's grounds for determining a deficiency was the fact that the decedent did reserve this power and that Section 2280 of the Civil Code of California provides that "unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." (Tr. pp. 9, 10.)

The trust agreement of December 20, 1938, for the benefit of decedent's grandson, Ralph Sickard, was not expressly made irrevocable by the trust indenture (Tr. pp. 288, 289, 290) and therefore could have been revoked by the decedent, Adolph Koch, at any time before his death.

Since the agreement was drawn by the decedent's attorney, Faber Johnston, after a conference with the decedent, during which the latter suggested the provisions of the trust (Tr. pp. 75, 76), it is reasonable to assume that if Mr. Johnston was not directed by the decedent to make the agreement revocable, he fully advised him of the legal effect of not specifically mak-

ing it irrevocable and that the decedent approved this retention of a power in himself to revoke the agreement at any time.

The retention of the power to revoke looked to further activity, management and discretion which was necessarily associated with motives of life.

(b) The Court disregarded the decedent's statements which, supported as they were by the surrounding circumstances, were the best evidence of both his motive and mental condition.

The Court below completely disregarded statements made by the decedent to his attorney, son and housekeeper which clearly disclosed both his motive in making the gifts and his mental condition at the time. These statements were amply supported by the surrounding circumstances.

It is difficult to see what better proof there could be of the decedent's motive and his state of mind than his own statements. To give them no probative force at all is to impugn without justification the veracity of the decedent. Surely no one should know better than he why he made these gifts.

The United States Court of Claims, whose judgment in *Wells v. United States* (69 Ct. Cls. 485, 39 Fed. (2d) 998) in favor of the tax payer was affirmed by the Supreme Court (*United States v. Wells*, 283 U. S. 102), recognized the almost conclusive probative value of a decedent's statements which, like these here, were supported by all the circumstances surrounding the transfers. The decedent had made repeated statements to close friends and associates about the condi-

tion of his health and his motives. The Court accepted these statements at face value. Concerning them it said at page 1011:

“The best evidence of the decedent’s state of mind and the reasons activating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all circumstances concerning the transfer.”

Estate of Joseph W. Marsh, B.T.A. Memo Dec. 42,090, 1942 P.H. Tax Service 64,332, is another case where a statement of the decedent disclosing his state of mind was given effect. At the age of 77 *years* the decedent had irrevocably transferred certain insurance policies in trust; about a *month* after this he had died. When he created the trust he was not in the best of health. He was told by one of the officials of the trust company, which acted as the trustee, that under the Federal Tax Law, should he die within two years of the execution of the trust, there was a presumption that the instrument was executed in contemplation of death. Decedent laughed and said, “We don’t need to worry about that. I expect to live a long time.” To other associates he expressed the belief that he would live to a ripe old age. Decedent did not take seriously his physician’s idea that he was not a well man. It was held that the transfer was not in contemplation of death.

In the instant case the disregarded statements clearly revealed the decedent’s mental condition when he made the gifts. He said to his son-in-law, “Don’t worry about me croaking, I’ll live longer than you

do” (Tr. p. 156), and to his housekeeper, “I’m going to live to be a hundred.” (Tr. p. 150.) The circumstances surrounding these statements will be discussed in detail hereinafter.

He was also told why he was making the gifts. When the Court below stated “there is very little evidence in the record upon which to rest a finding that any of his gifts were in this category”, i.e., gifts motivated by impulses primarily associated with life (Tr. p. 37), it ignored the several statements made by the decedent to his attorney, Faber Johnston, his son George, his housekeeper, Angelyn Compton and others, in which he disclosed his motive, as well as a background of family conflict which gave these statements full content.

The result was a decision couched in words of indecision. With respect to the trust for Ralph the Court states that “it is *difficult* to see why it was created, if it were not for the reason determined by the respondent”. Of the gift to George, it states that “the gifts to the son *seem* to be in the same category. They, like the gifts to Ralph, *appear* to have been made as substitutes for and in lieu of testamentary disposition of his property.” (Tr. pp. 39, 40; italics supplied.)

When the decedent made the transfers he told his attorney, who drew the trust agreement of December 20, 1938, that Ralph’s father “refused to send the boy to college; that he said he couldn’t afford it; that he (decedent) said he was going to send him to college and that Mr. Swickard (the boy’s father) objected to it and that he (decedent) was going to send him to college”. (Tr. pp. 79, 80.)

He then went on to say that he was “going to fix it so the boy would be absolutely independent and that his father or his stepmother would have nothing to do with the boy’s business” and that “*this was why* he was transferring this property to the boy so he would be absolutely independent of his stepfather and mother”. (Tr. pp. 79, 80.) This conversation was held in the attorney’s office. (Tr. p. 79.)

Prior to this conversation, there had been a number of family “falling outs” between him and the boy’s parents over their treatment of the boy. He told his housekeeper that “Ralph was kind of kicked out”, that “she (the stepmother) had never been a mother to that boy” (Tr. p. 144), and that “Ralph has got no home, he has got no mother.” (Tr. p. 145.) The boy’s parents had forced him to live in the backyard instead of their house (Tr. p. 80), the stepmother had refused to wash and mend his handkerchiefs and clothes (Tr. p. 144); the parents had complained about the decedent giving the boy \$250.00 to go to a Monterey preparatory school (Tr. pp. 155, 156), and they had objected to the decedent sending him to Stanford. (Tr. pp. 145, 156.) These conflicts had caused decedent great mental anguish (Tr. p. 144) and he was bitter to the point of obsession. (Tr. p. 165.)

He told his housekeeper that “Ralph’s stepmother was jealous because her boy couldn’t go to Stanford and didn’t want Ralph to go for that reason, but that Ralph has no home and he has got no mother and I am going to give Ralph a good education and put him in business (Tr. p. 145), and on another occa-

sion, "I am going to give Ralph the money to put him through Stanford." (Tr. p. 145.)

He told his son George, "I don't like the way Ralph's father and mother are acting. I gave him \$500.00 and told both the father and stepmother that the boy had gotten his credits and he was going to Stanford and they said, 'well, he isn't going to Stanford, we can't see him through' and I said 'well I am going to see the boy through'." (Tr. p. 156.)

When Ralph's stepmother told him that she didn't want Ralph to go to Stanford because "her own boy didn't have an opportunity and that there was no reason that he couldn't go to our State School here and live home" he told her "I want Ralph to have the same opportunity that George's boy had" and that "I am going to see him through Stanford." (Tr. p. 156.)

All of these conversations took place in the summer and fall of 1938, before and after Ralph had entered Stanford. While some of them are general, they reveal the formation of an intent which had become crystallized when he told his attorney that he was transferring the property to the boy so he could go to college and be independent of his parents.

Though decedent's explanation of his own motive was a satisfactory one in light of these family quarrels, the Court below substituted its own. "Decedent must have known in the latter part of 1938 that Ralph had no immediate need for any large sum of money and that several years would elapse before he could embark on a business career. So long as decedent

lived he was in a position to furnish Ralph with funds required, either for his education or his business.” (Tr. p. 38.)

Of course, the decedent knew that so long as he lived he could furnish Ralph the money needed to go to Stanford, but the boy’s father and stepmother were objecting to his doing so. They were afraid that if anything happened to the decedent while Ralph was at Stanford they would be straddled with the expense of keeping him there. *They* were contemplating the possibility of his death. When the decedent in the fall gave Ralph \$500 to enter Stanford the issue had come to a head. Both the parents had come over to see him and had renewed their objections. The boy’s father said, “Well, he isn’t going to Stanford, we can’t see him through.” The decedent answered, “Well, I am going to see him through.” The father then said, “Well, how do we know that you are not going to croak, Mr. Koch, and that this money is going to come forth?” The decedent replied, “Don’t worry about me croaking. I’ll live longer than you do.” (Tr. p. 156.)

This pressing situation was the reason he “advanced the time of enjoyment by Ralph of such a substantial portion of his property”. (Tr. p. 38.) He wanted to remove the fear of Ralph’s parents and the objection based on it as well as to restore peace in the family and to insure against the contingency of Ralph being forced by his parents to withdraw from Stanford at some future date.

No doubt, too, Ralph must have been disturbed by these quarrels. He must have felt a sense of insta-

bility, knowing that his college career might be cut short by his parents. What could be more natural than that the decedent should wish to secure the boy's mental tranquility to enable him to more effectively pursue his studies?

This motivation established, the gifts to George are seen to be made to equalize the ones to Ralph. This is a familiar motive where a donor has several children. He wants to even things up and not favor one child over another. "Now George, I want you to take some comparable amount for yourself." (Tr. p. 159.)

In *Henshaw v. Anglim*, 1940, P.H. Tax Service, par. 63,034, the decedent, who was a woman of the advanced age of 82 years, was suffering from a chronic stomach disturbance at the time she made a gift of cash and securities of a value of about \$10,000. The purpose of the gift, which was made almost a year before she died, was to equalize gifts that she had made to a deceased son. She told her son, "Suppose I give you my brokerage account with Dean Witter. He (the other son) has gone and I feel I want to do something for you while you are young enough to enjoy it." There was no direct evidence offered to show that the gift was made in contemplation of death. Like Koch, the decedent was in good spirits, was mentally alert and keenly interested in things about her. There was nothing in her attitude to indicate any contemplation by her of the imminence of death. In holding for the taxpayer the Court said:

"The motive that activated the deceased in making the gift in question to her son Thomas is

found in her statement to him following the death of her other son that she wanted to make a gift to her living son for what she had done for her deceased son during the latter's lifetime."

In the *Estate of John R. Gillingham*, 1942 Memo B.T.A., Dec. 42,102, 1942 P.H. Tax Service 64,353, gifts made within seven months of death by a decedent 64 years old were held not taxable when the motive was to equalize gifts to his children so that one child would not be favored over another. See, also, *Mercantile National Bank v. Thomas* (1941), D. Court, Texas 1941 P.H. 62,532.

There was an additional reason for the gift to George. Since 1913 the decedent had followed a liberal policy of making gifts to his son. Prior to the gifts in 1938 and 1939, he had given George over \$80,000.00. (Tr. pp. 45, 46, 47.) Around 1932 he was ready to make George another gift of about \$100,000.00, consisting of a large number of shares of American Telephone and Telegraph Co. and some money, but was dissuaded from doing so by his attorney who advised him that George would lose the property to the creditors of the securities firm of Gorman Kaiser Co., which had failed in 1930. George had been a partner in that company. (Tr. pp. 72, 73, 74, 80, 81, 163.)

When the Court states that "there is no evidence that the decedent had made any gifts to George after 1930 until the gifts now in issue were made" (Tr. pp. 39, 40) it conveniently overlooks this cogent reason why none were made.

When George was again in the clear, having been discharged in bankruptcy, the decedent revoked a will executed in 1932 which contained a spendthrift trust for George. (Tr. p. 73.) Then several years later, he gave George the shares of the A. T. & T. Co. stock and other securities in issue. The delay of about three years between the clearance and the gifts did not break the continuity of his policy toward George nor indicate an abandonment of his original intent.

Against the decedent's self-revealed motives, supported by these surrounded circumstances, the Court set up *inferences*. One of these is made from "the time and manner in which the transfers were made", another one from the fact that a man of his age "must have known that the sands of life were fast running out, that his life expectancy was short". (Tr. p. 41.) It has sought to bolster up these inferences with statements which are wholly unsupported such as that when the decedent made these gifts he was "spending most of his time in a chair on the porch or at the front window of his home, the normal activities of a busy life had all but ceased". (Tr. p. 41.)

The Court ties into the time and manner in which these gifts were made, two gifts of \$1000.00 each to his sister-in-law and niece and one of \$15,000.00 to his brother Carl. The codicils to his will stated that these gifts had been made "in lieu of" the bequests. Since the advance to the brother was made in 1937 and 1938, it was not part of the instant circumstance. The purpose of advancing the bequest to Carl had been to help him pay off his creditors in the wood

and coal business. (Tr. pp. 153, 154.) The gift to his sister-in-law was made as a Christmas gift and the one to his niece because she was sick, unmarried and had "no husband to work for her and no home". (Tr. p. 146.) There was in the case of these three gifts, as in that of the gift to Ralph, the desire to recognize the special needs of these relatives.

The Court states "it is a significant fact, however, that the decedent followed the intention expressed in his will of dividing his property, *per stirpes*". (Tr. p. 38.) This is hardly of any significance. Normally parents make equal gifts to the natural objects of their bounty who will divide their property under their wills in equal proportions.

Though the Court states that "while age alone is not a decisive test, *Slack v. Holtagel*, supra, it may well tip the scales where other facts strongly point to testamentary disposition" (Tr. p. 41), the rationale of its decision is the advanced age of decedent. This is disclosed by such statements as "he must have known that the sands of life were fast running out, that his life expectancy was short and that it was highly desirable his house be put in order. He was almost 84 years of age when the gifts were made * * *" (Tr. p. 41), and the fact that there is no direct evidence here to show that decedent ever contemplated death.

The decedent in *New England Trust Co. v. White*, U.S.D.C. Mass. 1928 (no opinion), was 92 years of age and died four months after making the gift, but it was held that the gift was not made in contempla-

tion of death. In the *Estate of Nettie I. McCormick*, 13 B.T.A. 423, the decedent created a trust when she was about 84 years of age. She died at 88 years of age of acute bronchial infection. It was held that the trust was not made in contemplation of death. In the *Estate of Edward Moore*, 21 B.T.A. 279, the decedent, within two years prior to his death and when he was about 84 years of age, gave his son securities to the value of \$380,000.00. He died at the age of 86 years. It was held that the gift was not made in contemplation of death.

Even if it were to be admitted *arguendo* that "the premonitions and promptings which old age may give" influenced the making of these gifts, the declarations of the decedent and the attendant circumstances indicate clearly that the *dominant* motive of the donor was not a concern about death but the recognition of the special exigency which was shown to exist here.

The Supreme Court in *United States v. Wells* (supra), stated the applicable rule on "contemplation of death" as follows (pp. 117, 118, 119):

"The reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive.

* * * Old age may give premonitions and promptings independent of mortal disease, yet age cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than death, may motivate the transfer. * * * It is common knowledge that a frequent inducement is, not only the desire to

be relieved of responsibility, but to have children, or others who may be the appropriate objects of the donor's bounty independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. *There may be the desire to recognize special needs or exigencies* or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death. * * *

There is no escape from the necessity of carefully scrutinizing the circumstances of each case *to detect the dominant motive of the donor in the light of his bodily and mental condition.*" (Italics supplied.)

When the findings of the Tax Court are analyzed, it will be seen that there is not a single fact recited from which it could be inferred that the decedent made these transfers because he was contemplating death. The decision of the Court was founded on an erroneous interpretation of the term "contemplation of death". It has applied the criterion of a "general expectation of death" rather than of a "particular concern, giving rise to a definite motive".

- (c) **The Court disregarded other material evidence as to decedent's bodily and mental condition and found other facts which were unsupported by the evidence.**

When the gross errors in the statements which the Court makes to bolster up its inference of intent are considered with the disregard of the evidence discussed under (a) and (b) hereof, it will be seen that

there is no substantial evidence to sustain the finding and conclusion that the decedent made these transfers in contemplation of death.

The Court goes far afield of the record when it states that at the time the gifts were made the decedent "was spending most of his time in a chair on the porch or at the front window of his home" and that "the normal activities of a busy life had all but ceased". (Tr. p. 41.)

This was certainly not true in December of 1938 and January of 1939. During all of the year 1938 the decedent attended all of the meetings of the board of directors of the San Jose Building and Loan Association, of which he was a director, except two. On December 21, 1938, *or the day after* he made the gifts to George and Ralph, he attended a meeting of the directors at which a discussion took place whether the association should accept the repayment of a loan totaling over a half a million dollars without the payment of a penalty for a prepayment. The decedent led the discussion and proposed a resolution that the company accept the payment of a penalty. He told the other directors that it was better to take the money because smaller loans were much more advantageous to a loan company than one large one. The other directors had such confidence in his business judgment that the motion was carried unanimously. (Tr. pp. 127, 128, 129.)

During 1938 and 1939 the decedent attended meetings of the securities and finance committee of this association and went out with the other members of

the committee to inspect properties on which loans were to be made. He would discuss these loans with the committee members and then sign the appraisals. He was also interested in the expenses of the business and checked carefully on that angle. (Tr. pp. 70, 71, 129.) During 1939, he would call frequently at the office of the association and talk with the officers about their loans and with the employees about other matters. (Tr. pp. 70, 71.)

The decedent had been president of the association for many years but had left it several years before. When the association encountered financial difficulties the directors asked him to come back and help get it out of its difficulties. This was about two years before his death, and although he was 82 years of age at the time he went back to active participation in its affairs as a director and vice president he was a factor in getting the association back in good financial shape. (Tr. p. 50.) The record shows that his interest in its affairs did not lag in 1938 or 1939. Obviously a man whose normal activities have all but ceased does not religiously attend directors' and committee meetings, discuss loans, appraisals, etc.

The Court stated that the decedent was "tax conscious, as is indicated by the fact that he deliberately divided the gifts between 1938 and 1939 in order to minimize his tax liability". (Tr. p. 41.) The record shows that this was done at George's suggestion and not the decedent's. But since the purpose to gain an additional exemption for *gift* taxes and not *estate* taxes, it is entirely irrelevant.

When the Court states that “it would be closing our eyes to the obvious to hold that thoughts of death did not enter into his mind and motivate the transfer” (Tr. p. 41), it clearly reveals that it is applying an erroneous rule of law to these facts. “Thoughts of death” are only “the general expectation of death”, or at best “the premonitions and promptings” which the Supreme Court has held the statutory term “contemplation of death” does not mean. They do not constitute “a particular concern, giving rise to a definite motive”. (*United States v. Wells*, supra.)

The decedent’s other activities further contradict this inference. In 1938 he bought himself a new Dodge coupe car and obtained an operator’s license to drive it. He drove the car in 1938 and 1939, once to San Francisco to see George. (Tr. pp. 54, 55, 56, 81, 132.)

About four months after he made the December 1938 gifts, or some three months before he died, he was planning to make a trip to Denver to see his brother Carl. He intended to make this trip as soon as he had his upper teeth pulled and a new plate made. (Tr. pp. 148, 149.) Now, a man whose normal activities have all but ceased does not plan to take long trips.

In *Estate of Arthur L. Stark*, 8 B.T.A. 1150, the decedent during the summer of 1923 contemplated a trip to Europe and often talked about it. Less than two months before he died he purchased a new Packard car which he drove himself. No one testified that decedent did not possess the same strong, vigorous

mind of former years. It was held that the petitioner had fully rebutted the presumption relative to transfers made within two years prior to death.

During 1938 and 1939 Koch would frequently walk from his home to the office of the building and loan association, a distance of five blocks. (Tr. p. 71.) Though as the Court states, on occasions he rode there in an automobile, that does not diminish the fact that on most occasions he walked. Nor is there any significance in the fact that he had George secure the stocks and bonds from his safety deposit box and call the attorney to discuss the details of the trust. He could have gotten them himself if he had chosen to do so, as he visited his bank once a month during 1938 and 1939, attended personally to his own business affairs, discussed business matters with his neighbors, drew his own checks, paid taxes and purchased stocks and bonds. (Tr. pp. 123, 124, 152, 153, 154, 155.)

What if "in at least some of the trips to the barber shop the decedent was assisted by his housekeeper"? (Tr. p. 41.) The record does not show that she assisted him, but only went along. He walked to the barber shop a block away from the house, once a month alone. Until the day of his death he was very regular in his habits, rising at 5 o'clock, shaving himself with an electric razor, eating hearty meals, calling on real estate men, bankers, etc. (Tr. pp. 136, 137, 138.)

On December 25, 1938, as had been his custom for many years previously, he walked down to the Ma-

sonic Temple and personally attended to all the details of the Christmas breakfast of the Knights Templar Commandery. He had been in charge of this breakfast for many years. He took great pains that day to see that the tables were fixed right, that the hams were cut right, that the decorations were all right and that the ladies waited on the tables. He also gave a speech to the members. (Tr. pp. 139, 140, 141.)

The petitioner did not attempt to picture decedent as being in perfect physical condition. Few men over eighty years of age are. But an examination of the physical conditions of the decedents of advanced years in the contemplation of death cases decided favorably to the taxpayers indicates that decedent was in much better condition when he made these gifts than were these other decedents.

The facts of the instant case are strikingly similar to those of *United States v. Wells*, supra. The essential facts of that case are these: John Wells died on August 17, 1921, at the age of 73 years, leaving his wife and five children surviving him. Since 1901 the decedent had been making advancements of money and other property to his children. He kept a set of books on which he charged to his children some, but not all, of the amounts transferred to them.

On December 1919, January 1, 1921 and January 26, 1921, the decedent made certain transfers of stock to his children and to a trustee for the benefit of his wife and children. The latter two transfers were made approximately seven months before his death.

At the time of these gifts Wells was suffering not only from asthma but from ulcerative colitis, a disease from which he was to die subsequently. Decedent had been informed in detail of this condition by his doctors who told him that he would get well. On September 22, 1920 he had been discharged from a hospital where he had been confined since July of that year and where a specialist in bowel diseases had diagnosed his case as ulcerative colitis and the doctors had found also marked evidence of an inflammation of the ethmoid cells which are connected with the nasal cavity. When discharged, however, he was in an improved condition and he fully recovered within the next two or three months. During this time he was in a very fair state of health, his appearance was normal and he had gained weight. He resumed his normal business activities. He told his son that "he was completely cured of the trouble that he had had and he felt good".

On November 20, 1920, he was hospitalized again for the purpose of an operation to relieve his asthma, but was discharged on December 9, 1920. On January 1, 1921, he made one of the gifts. Nine days later, on January 10th, he went back to the hospital for the completion of the nasal operation. He was discharged again on January 14, 1921 and the doctors pronounced him 90% normal in respect to the colitis but told him that he would always have asthma. The doctors told him also that he need have no anxiety about his state of health or of any recurrence of the colitis.

On January 26, 1921 he made another one of the gifts. In April he had a recurrence and in June he re-entered the hospital. His condition proved to be due to a virulent form of infection that failed to yield to treatment and he died on August 17th. The determination of the Commissioner of Internal Revenue that the transfers were made in contemplation of death was reversed by the United States Court of Claims and this judgment was approved by the United States Supreme Court. (*United States v. Wells*, supra.)

Regarding the matter of his health, the Court of Claims said (p. 153):

“At the time the transfers were made, decedent had no reason to believe otherwise than that aside from his asthma, he was, *for a man of his age*, in ordinary health. While he had gone through a most serious and painful illness he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician. * * * The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business and affairs, his letters to his children assuring them of his recovered health, showed that he fully believed the assurance given him by his physician that he was cured and had nothing to fear on account of his former illness.

The presumption created by the statute that the transfers in question were made in contemplation of death cannot stand against ascertained and proven facts showing the contrary to be true. * * *” (*Italics supplied.*)

In the *Estate of John Moir*, 47 B.T.A. (No. 104), 1942 P.H. Tax Service 64,977, the decedent died at the age of 81 years. In November, 1939, he suffered a cerebral hemorrhage and aphasia. His attending physician did not inform decedent that he had had a stroke. He recovered from this though not from the aphasia. In February and May of 1934 he made certain gifts to his children. Thereafter he consulted with his physician almost every week in 1934, 20 times in 1935, 10 times in 1936 and twice in 1937. The frequency of these visits was partially due to his affection for the physician and the fact that his son had asked the physician to keep an eye on him. In 1933 he had an operation for hemorrhoids from which he recovered. In February of 1938 he had another attack of coronary thrombosis and on September 1938 a third one which proved fatal. For many years before these gifts, he had made frequent gifts to his children as did Koch. Like Koch, he never spoke about death. Like him too, he had a considerable fortune left to take care of his own needs. Each gift had an adequate explanation. This Tax Court held that it was "not necessary to supplement it by a reference to its testamentary tax effect."

In the *Estate of Louis A. Meyers, Jr.* (1941), B.T.A. Memo Dec. 41,542, 1942 P.H. Tax Service 64,142, the decedent died at 81 years of age. Although he suffered from prostate trouble, except for a short period about one year before the date of the gift he was in good health. He died of cardiac and respiratory failure. It was held that the gift to his son was not made in

contemplation of death but to make up for an insufficiency of compensation paid the son in past years for services rendered in decedent's business.

In the *Estate of John R. Gillingham* (1942), B.T.A. Memo. Dec. 42,102, 1942 P.H. Tax Service 64,353, the decedent in 1933 had a stroke. In 1934 his blood pressure was 205 systolic, 125 diastolic, which the Court characterized as "high". (Compare these readings with Koch's normal ones, Tr. pp. 63, 64, 89.) On January 14, 1937 his blood pressure was 205/135 or higher. The doctor (like Dr. Cottrell here) did not discuss decedent's condition with him. *On the next day*, January 15, 1937 he made the gifts involved. He died about *seven months later* on August 20, 1937 at the age of 64 years of the same condition which caused the stroke. This Court held that the gifts were not made in contemplation of death but to equalize a gift to a married daughter by making a similar one to his son so that one child would not be favored over the other.

In the *Estate of John B. Waterman* (1941), B.T.A. Memo Dec. 41,551, 1942 P. H. Tax Service 64,154, decedent had a kidney operation in 1930. The wound never wholly healed but required the daily attendance of a doctor and a nurse. Later his other kidney became affected. While thus ill, he made certain gifts to his wife on March 8, 1937. *Seven weeks later*, on April 30, 1937, he died at the age of 71 years from these causes. This Court noted that he had lived longer than his doctor expected him to. Because of definite motivation associated with life, the gifts were held not includible in gross estate.

In the *Henshaw* case (supra), when she made the gift the 82-year-old decedent was suffering from a chronic stomach disturbance which required a moderate diet. The Court regarded her as in fairly good health for "a woman of her age". It said:

"It is true that the decedent was ill at the time the gift was made, but it was not a serious illness according to all the evidence but rather a chronic gastric ailment which she had for a long period of time before the gift was suggested by her. Her son testified that at the time of making the gift, his mother had been as well as she had been ten years previous."

With respect to the decedent's state of health, the facts here are stronger than in the above cases. When Wells made two of the gifts involved in that case, he was suffering not from ulcerative colitis, the disease from which he was to die within the short space of about seven months thereafter. Adolph J. Koch was suffering from no disease when he made the gifts to George and Ralph. All his life he had enjoyed the best of health and had never been confined to his bed a day or consulted a doctor until he was treated by Dr. McGinty some five years before his death for an injury to his left hip which he received when hit by an automobile. (Tr. p. 48.) This injury knocked in the cap of his left hip. (Tr. pp. 49, 135.) Dr. McGinty testified that this injury was on the right side, but both George and the housekeeper, who observed decedent daily, testified it was on the left side. (Tr. pp. 49, 135.)

Whenever he made a quick turn, the left hip got out of place and caused him to fall. (Tr. pp. 113, 139.) He had two such falls caused by this injury, one on May 18, 1938 and one on June 29, 1939, both while he was shaving himself in the bathroom. This latter fall ruptured his left hypogastric artery and brought on an extraperitoneal hemorrhage which caused his death less than twenty-four hours later. Thus Koch died as the result of an accident and not of a fatal illness. (Tr. pp. 110, 111, 114.)

Dr. Cottrell, who treated him on the occasion of the first fall in May 1938, diagnosed the case as one of paralytic stroke. It is submitted that this diagnosis was entirely incorrect. Cottrell did not examine Koch's body nor did he take Koch's blood pressure or temperature, as any conscientious doctor would have done. (Tr. p. 90.) His diagnosis was purely superficial, based on the fact that Mrs. Compton had told him that Koch had fallen and that he could not use his left leg, arm and hand. (Tr. p. 88.) Four days later, on May 22nd, he took Koch's readings at which time they were: Systolic 145, diastolic 75, pulse 84, temperature 98.2. (Tr. p. 89.) Dr. Childers testified that these were normal readings for a man of Koch's age, that an elevated blood pressure of at least 200 systolic, over 110 diastolic would have been necessary for a stroke, and that there would be no material descent in the blood pressure following a stroke, so that it was absolutely impossible for Koch to have had a stroke on May 18th with these normal readings. (Tr. pp. 63, 64, 65.)

If this were not sufficient to completely discredit Cottrell's superficial diagnosis, it would be impeached by the fact that Cottrell, on cross-examination, admitted that in the case of a stroke on one side of the body the reflexes on the opposite side are generally increased because of an irritation to the brain surfaces but that the decedents were not so increased. Cottrell offered no explanation why they were not. (Tr. pp. 93, 94.) Dr. McGinty, who testified that Koch had "probably had a light stroke, because he cleared up so quickly" (Tr. p. 114), had not treated him on the occasion of the first fall and only made this observation as a neighbor. (Tr. p. 114.)

In any event, even if the diagnosis were correct, Dr. Cottrell did not tell the decedent that he had suffered a stroke, but reassuringly told him "stay in bed a few days and you will be all right". (Tr. p. 134.) The thought never occurred to Koch that he might have had a stroke.

When found by Mrs. Compton on his bed (to which he had been able to move himself from the bathroom) he was perfectly conscious and answered her question, "what's the matter, are you sick?" with the statement, "no, I was in the bathroom shaving and I fell and hurt my hip". (Tr. p. 133.) This incident, therefore, could hardly have caused him any concern, nor interrupted his natural propensity to continue believing that "I am going to live to be a hundred". (Tr. p. 150.) The suggestion made by his son-in-law, Jim Swickard, several months after the

fall that he might "croak" produced an angry retort from him, "Don't worry about me croaking. I'll live longer than you do." (Tr. p. 156.) Dr. McGinty, who saw him nearly every day in 1938 and 1939, testified that "he looked wonderfully well". His limp that he had after Dr. Cottrell took care of him had cleared up almost entirely; that "he got around without using a cane very much and was very independent, refusing any kind of assistance." (Tr. pp. 107, 108.) Certainly there was nothing in his conduct to indicate that he was worried about this condition.

The quick recovery from the effects of the May fall (the limp had cleared up almost entirely), must have strengthened his deeply-rooted conviction of longevity based on the fact that he had enjoyed perfect health for over eighty years. But for his subsequent unpredictable accidental death, he might have lived many more years, even if he did fall short of his goal. He believed himself completely recovered from the effects of the May fall and he continued on in the even tenor of his ways. The extent of his activities has been discussed herein before. He was described by the witnesses as a "curiosity" because of his independence, a "wonderful neighbor" with a "happy outlook on life" and a "kidding way", who was "always cheerful" and "pretty much of a Christian Scientist when it came to thinking there was anything wrong with himself", and who never talked about death with anyone, even Mrs. Compton, who was with him much of the time in 1938 and 1939. (Tr. pp. 112, 116, 124.)

It is clear from the foregoing that there was nothing in decedent's bodily, as well as in his mental condition, which would give rise to a particular concern about death of sufficient cogency to be stronger than or dominate over the motives which he revealed in his statements to his closest associates.

POINT II.

NOR WAS THE TRUST FOR THE GRANDSON OF DECEMBER 20, 1938, INCLUDIBLE IN DECEDENT'S GROSS ESTATE UNDER SECTION 811 (d) OF THE INTERNAL REVENUE CODE.

Though the effect of Section 2280 of the Civil Code of California was to reserve to the decedent a power to revoke the trust, the trust was not includible in the decedent's gross estate under the broad language of Section 811 (d) of the Internal Revenue Code (Section 302 (d) of the 1926 Revenue Act). Section 2280 is a peculiar local rule obtaining only in California, the universally applied common law principal being that a trust is irrevocable unless the power to revoke is specifically reserved. As a statutorily imposed power of revocation, it is a condition imposed by law and as such not within the contemplation of Section 302 (d), which appears to require the formal reservation of the power in the trust instrument.

The essential difference between a formal power to "revoke, alter or amend" within the meaning of this section and a condition imposed by law is the rationale for the decision of the Supreme Court in *Helvering v. Helmholz*, 296 U.S. 93, 56 Sup. Ct. 68.

There a power in the trust instrument to terminate upon delivery to the trustee of a written instrument signed by all of the then beneficiaries, of whom trustor was one, was held not within the statutory contemplation as it was merely declaratory of a right conferred by state law.

In Poor v. White, 296 U.S. 98, the Supreme Court held that the section did not apply if the power was one not reserved to the settlor in the original declaration of trust. There the power had been omitted, but it was provided that the trust could be terminated in whole or in part at any time by the three trustees, including the settlor who was also a trustee. Resigning as trustee, the settlor was reappointed a year later by the remaining trustees after the resignation of the settlor's successor. The unexercised power was viewed by the Court as having been acquired, not by reason of formal reservation, but by virtue of the settlor's appointment as a trustee, and thus "neither technically nor in substance" as falling within Section 302 (d).

In *Dorothy Allen v. Commissioner*, 38 B.T.A. 871 (1938), the United States Board of Tax Appeals considered an analogous question under Section 501 (a) of the Gift Tax Act of 1932. The taxability of a gift made by a minor was involved. If the gift was complete when made, it was taxable then, otherwise not until the minor, on attaining majority, failed to exercise his general legal right to avoid his gifts. Recognizing this power as a condition imposed by law, the Board, in holding the gift complete when made, cited both the *Helmholz* and *White* cases to the

effect that there is a distinction between a power to revoke and a condition of law and that the former must arise from the trust instrument itself. Reversing the Board, the United States Circuit Court of Appeals for the Third Circuit decided that there was no difference between a power of a donor to revoke which was expressly reserved in an instrument of transfer, and a power imposed by law and that the gift was thus incomplete when made. Both the *Helmholz* and the *Poor* cases were distinguished on the ground that the question was not there presented, as the settlor's powers came to them either as a beneficiary (*Helmholz*) or as a trustee (*White*) and not as a settlor as such.

Hughes v. Commissioner, 104 Fed. (2d) 144 (C. C. A. 9th, 1939), also involving a construction of Section 501 (a), was concerned with a California transfer which was complete and irrevocable as a gift, no power to revoke having been reserved by the settlor in the trust agreement. Whether Section 2280 was applicable was not decided, since it was held that the law of Massachusetts (the situs of the trust) governed in determining when the transfer became consummated as a gift. The observation of the Circuit Court in the *Allen* case—that it was implicit in the *Hughes* case that a power to revoke a transfer in trust arising by operation of law would come within the purview of Section 501 (a)—was, therefore, purely obiter. Clearly neither case is controlling here.

The distinction attempted in the *Allen* case, however, overlooks the treatment by the Supreme Court of the termination clause in the *Helmholz* trust as

the equivalent of the general rule that all parties in interest may terminate. This rule requires the consent of the settlor during his lifetime. It is thus implicit in the case that the clause did provide for the settlor's consent. For this reason alone the clause "added nothing to the rights which the law conferred", and the essential difference between a power to alter and a condition imposed by law was necessarily noted.

Though the language of the 1936 amendments to Section 302 (d), which requires inclusion no matter in what capacity the power to revoke is exercisable or from what source it was required, is very broad, the intent (except to remove doubts about a power to "terminate" being equivalent to the trio "revoke, alter and amend") was to obviate the effect of *White v. Poor* as to action taken according to an instrument other than, and subsequent to, the creating document. This intent is clearly spelled out from the legislative history of the amendments. See H.R., Rept. No. 2818, 74th Congress, 2nd Session, at pp. 9-10, where it is stated that "The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White v. Poor* (296 U.S. 98). The Court held that the power to terminate existing in the decedent at the date of her death resulted from the action of the other trustees and not by virtue of any power *reserved* to herself or settlor in the original estate. It is therefore provided that Section 302 (d) covers a power whether *created* at the time of transfer or *thereafter* arising from any source and whether exercisable in an individual or representative capacity." (Italics ours.)

The word "source" is not defined by the regulations (Article 20, Estate Tax Regulation 80) to include conditions imposed by law. There is thus absent any congressional approval by subsequent enactments. When construed in view of the limited legislative purpose, it would seem clear that conditions imposed by law are not envisaged by the amendments.

The distinction drawn in the *Helmholz* case is recognized in other cases. In *Newhall v. Casey*, 18 Fed. (2d) 447 (D. Mass. 1927), a transfer from a husband to wife which was an absolute gift in form was held not to be a part of his taxable estate subject to inheritance tax, although a condition imposed by Massachusetts law made such gifts revocable during the husband's lifetime. *Safe-Deposit & Trust Company v. Tait*, 54 Fed. (2d) 383 (D. Md. 1931), was a case where the condition imposed by law was the power of an incompetent (still existing at date of death) to avoid a transfer. It was argued that, as he could have avoided the gift during his lifetime, his death, as in the case of a formally reserved power, was the fact or event which, by removing the possibility of revocation, made the gift absolute. The transfer was held not includible for federal estate purposes. In *United States v. Goodyear*, 99 Fed. (2d) 523 (C. C. A. 9th, 1938), an irrevocable transfer by a husband to his wife of a present, existing and equal interest in community property acquired before July 29, 1937 (the effective date of an amendment to Section 161(a) of the Civil Code) was held not to be subject to a power to "alter, amend or revoke" includible pursuant to Section 302 (d) because of the statutory rights of management and control of the husband.

POINT III.

THE FINDING THAT THESE TRANSFERS WERE MADE IN CONTEMPLATION OF DEATH MAY BE REVIEWED BY THIS COURT.

The finding that these transfers were made by the decedent in contemplation of death is an ultimate finding, which is really a conclusion of law, or a determination of mixed law and fact, based on the Tax Court's finding of primary, evidentiary or circumstantial facts. As such it is subject to judicial review on which review the Court may substitute its judgment for that of the Tax Court. (*Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569.)

In this case the question was whether a certain transaction was within the non-recognition provisions of Section 202 (b) of the Revenue Act of 1918. In pursuance of a plan of reorganization the assets of an oil company and undivided interests in oil leases owned by individuals were conveyed to a new company which delivered part of its shares and a sum of cash to the old company (later dissolved) and paid cash to the individuals. The Board of Tax Appeals, after finding the evidential facts, made an "ultimate finding" that the consideration moving to the old company from the new one included the cash delivered to the former as well as the shares and upon that ground refused to apply the non-recognition of gains provision. The Court said, at p. 491:

"In addition to and presumably upon the basis of these findings (of circumstantial facts) the board made its 'ultimate finding'. And upon that determination it ruled that the transaction was not within the non-recognition provisions of sec-

tion 202 (b). The ultimate finding is a conclusion of law or at least a determination of a mixed question of fact and law. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and on such review the court may substitute its judgment for that of the Board."

In the *Estate of Jefferson Hodgkins v. Commissioner*, 44 Fed. (2d) 43, reversing 12 B.T.A. 375, cert. denied 283 U.S. 82j, 51 S. Ct. 350, the Circuit Court reviewed the decision of the Board of Tax Appeals that the decedent made certain transfers in contemplation of death and held that there was insufficient evidence that decedent made the transfers because of some known information which he believed or entertained a fear might result in his death.

The rule is stated in *Paul & Mertens—Law of Federal Income Taxation*, vol. 5, paragraph 44.11, as follows:

"It is clear therefore that the Circuit Court of Appeals has ample power and even a duty to search the record to find whether any substantial evidence supports the findings of the Board, because whether there is any such evidence is a question of law and not of fact. Putting the point another way, the Appellate Court has not only the jurisdiction and power but also a duty to determine the legal effect of the facts in a case."

It is respectfully submitted that there is no substantial evidence to support the finding and conclusion that the decedent made these transfers in con-

templation of death, that the Tax Court has applied an erroneous principle of law to the facts and that the petitioner successfully rebutted both the presumption that the Commissioner's determination was correct and the statutory one that gifts made within two years of death are made in contemplation of death.

Dated, San Jose, California,
November 15, 1943.

GERALD S. CHARGIN,
Attorney for Petitioner.

No. 10506

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

GEORGE A. KOCH, EXECUTOR OF THE ESTATE OF ADOLPH
J. KOCH, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

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PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10506

GEORGE A. KOCH, EXECUTOR OF THE ESTATE OF ADOLPH
J. KOCH, DECEASED, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The report of the Tax Court consisting of its memorandum findings of fact and opinion is unreported. (R. 25-42.)

JURISDICTION

The petition for review involves a deficiency in federal estate taxes in the amount of \$22,544.18. (R. 25.) On May 22, 1941 (R. 4, 23), the Commissioner of Internal Revenue mailed the taxpayer a notice of deficiency of estate taxes determined by him in the amount aforesaid (R. 7-18). On June 28, 1941 (R. 1, 18), within 90 days after the mailing of the notice aforesaid, the taxpayer filed a petition with the United

States Board of Tax Appeals (now the Tax Court of the United States) for redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code (R. 3-18). And on August 16, 1941 (R. 2, 22), the taxpayer filed an amended petition (R. 18-22). On September 3, 1941 (R. 2, 24), the Commissioner filed his answer to the petition and amended petition (R. 23-34). The final order and decision of the Tax Court redetermining the deficiency in the estate tax in the amount of \$22,544.18 was entered April 14, 1943. (R. 3, 42.) The case was brought to this Court by a petition for review (R. 293-300), filed June 29, 1943 (R. 3, 300-301), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether there is evidence to sustain the finding of the Tax Court that transfers by the decedent, aggregating \$204,442.51, were made in contemplation of death, within the meaning of Section 811 (c) of the Internal Revenue Code.

2. Whether \$79,001.53 of the above mentioned amount representing the value of cash and property transferred in trust was includible under Section 811 (d) (1) of the Internal Revenue Code, because the decedent had reserved the power to alter, amend, revoke or terminate the transfer.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer's decedent, Adolph J. Koch, a retired resident of San Jose, California, died there on June 29, 1939, at the age of 84. His wife had predeceased him.¹ The decedent was survived by one child, a son, George A. Koch, and two grandsons, Kenneth, the only child of George, and Ralph J. Swickard, the son of the decedent's daughter, Hilda, who died shortly after Ralph's birth. (R. 26.) Ralph was raised by the decedent and his wife and lived with them until he was 17 or 18. The decedent was anxious that he should go to Stanford University where Kenneth was and on September 21, 1938, provided Ralph with \$500 for tuition. (R. 26-27.)

The decedent was a man of considerable means. In 1913 he gave George some flats of the value of about \$30,000 as a wedding gift; between then and 1930 he gave George at least \$10,000 additional in cash, and in 1930 \$40,000. In 1931 or 1932 he stated to his attorney that he planned to give George \$100,000 additional, but did not do so because George was in financial difficulties and might have lost it to his creditors. Instead, on the advice of the attorney, the decedent made a will, dated February 23, 1932, in which he declared a spendthrift trust in favor of George.² However, after George's discharge in bankruptcy and

¹ She had died five or six years previously. (R. 45.)

² The will is not in evidence and the record does not disclose what, if any other, gifts were therein made.

on July 25, 1935, the decedent executed another will which, with certain codicils, was admitted to probate upon his death. Therein the decedent, after making certain relatively small bequests, gave the residue to George and Ralph in equal shares. George's share was payable to him directly, but Ralph's was placed in a trust for him, George being named the sole trustee to act without bond. George was also named as the executor.³ (R. 27-28.) The testamentary trust provided that the trustee should use so much of the income as was necessary for Ralph's support, maintenance, and education, and that when Ralph reached the age of 21 one-fourth of the corpus should be delivered to him. The trustee was empowered to deliver the balance of the corpus to Ralph when he reached 25. The trust was to terminate when Ralph reached 30, at which time he was to receive the balance of the corpus, if any. Certain changes were made in the trust by a codicil dated March 3, 1937, whereby the dates of the distribution of the corpus to Ralph were advanced.⁴ (R. 28, 280-286.)

On December 20, 1938, the decedent made substantially equal *inter vivos* gifts to George and Ralph of cash and securities.⁵ The value of the gift to George

³ The will, as well as the codicils, is a part of Joint Exhibit A-1. (R. 269-290.)

⁴ The testamentary trust, as well as the codicil of March 3, 1937, made elaborate provision for the distribution of the corpus to George and Kenneth in the event that Ralph died without leaving issue before reaching the age at which the corpus was distributable to him. (R. 272-273, 282-285.)

⁵ For an explanation of the difference in the amounts, see George's testimony. He said it lay in the market value of some bonds. (R. 159-161.)

was \$79,290.98, and of that to Ralph \$79,001.53. Similarly as the gifts made by the decedent's will, the *inter vivos* gift to George was outright and the gift to Ralph was placed in trust with George as trustee.⁶ (R. 28-29.)

During the month of January, 1939, the decedent made further gifts directly to both George and Ralph of cash and property, to George of a value of \$23,150 and to Ralph of the value of \$21,000.⁷ (R. 29.)

The transfers made in 1938 and 1939, aforesaid, aggregated \$204,442.51. (R. 25.) The decedent retained the balance of his property of a value of \$142,605.39 until his death and it then passed under his will. (R. 30.)

The Tax Court further found, as regards the decedent's health, that about five or six years prior to his death he was struck by an automobile causing injury to the right hip. Thereafter his side bothered him. Prior to the accident, his health had been good; he seldom required the attendance of a physician. On May 18, 1938, the decedent had a paralytic stroke and for some time thereafter was unable to use his left

⁶ This trust is also a part of Joint Exhibit A-1. (R. 288-289.) Its provisions are substantially similar to those of the testamentary trust. However, the income therefrom was to be paid to Ralph until he reached 25, at which time the corpus was to be distributed to him. The trust also provided for the distribution of the corpus to George and Kenneth if Ralph died before he reached the age of 25 without leaving issue. (R. 289.)

⁷ The difference in the amount of these gifts was also explained by George in his testimony. He stated that the decedent gave him \$2,200 worth of bank stock to offset the gift of his automobile to Ralph which he said he wanted Ralph to have, directing George to put it into Ralph's name. (R. 160-161.)

hand and lower extremity. He had fallen while alone in his bathroom. His condition improved, however, and his limp "cleared up almost entirely." The decedent was independent, often refusing proffered assistance and at times walked without his cane. (R. 30-31.)

After his illness in 1938, the decedent spent most of his time sitting on the porch of his home or in the front room looking out of the window. He usually retired early and got up early. He was always in good spirits and never talked about his death. He was a director in a building and loan association and missed only two of the monthly directors' meetings. (R. 31.) From June 22, 1938, until his death the decedent did not require the services of a doctor, except for the treatment of an inflamed eye. The cause of his death was peritoneal hemorrhage caused by another fall in the bathroom on the morning of his death. Contributing causes were chronic interstitial nephritis and cystic degeneration of the right kidney, and senility. The contributory causes, except senility, were, however, revealed only by an autopsy and the decedent had never been treated for them. (R. 32.)

The Commissioner determined that the gifts which the decedent had made in 1938 and 1939 were made in contemplation of his death and the Tax Court found that they were so made.⁸ (R. 33.)

⁸ The Commissioner accordingly determined a deficiency in estate tax against the decedent's estate of \$22,544.18. (R. 15, 25.) He also determined that the transfer in trust made by the decedent on December 20, 1938, for the benefit of Ralph, of property valued at \$79,001.53, heretofore referred to, was includible in the de-

SUMMARY OF ARGUMENT

I

The contemplation of death issue

1. *Applicable Principles of Law.*—By including in the decedent's gross estate the value of property transferred in contemplation of his death, Congress intended to reach substitutes for testamentary disposition. Hence, the Supreme Court in *United States v. Wells*, held that the differentiating factor must be found in the decedent's motive, which must be of the sort that leads to testamentary disposition, and not in expectation or fear of immediate death. Before the Tax Court, the burden of proof was upon the decedent's representatives to show that the transfers in question were *not* made in contemplation of death. The taxpayer has not met the burden merely by showing that one of the decedent's motives was associated with continued life. The trier of the fact is free to find from all the evidence whether the dominant motive for the transfer was to make a substitute for a testamentary disposition, even though the

cedent's gross estate under the provisions of Section 811 (d) of the Internal Revenue Code since the decedent had reserved the power to alter, amend, revoke, or terminate said trust. (R. 9-10.) Although the Tax Court found that in this trust "no power to change, alter or amend the trust was reserved in the settler" (R. 29), and this is literally true because the decedent did not expressly reserve such power, nevertheless, the power was retained in view of the provisions of Section 2280 of the California Civil Code, which provides that, unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trust or by writing filed with the trustee.

evidence discloses statements of the decedent indicating that he was actuated by motives associated with life. On such review, the appellate court may not substitute its own finding for that made by the Tax Court. It is well settled that the question whether a given transfer was made in contemplation of death is purely one of fact, and that on that question the finding of the trier is conclusive if there is evidence to sustain it.

2. *An analysis of the facts.*—(a) The taxpayer's contention is without merit that the decision of the Tax Court is founded upon an erroneous interpretation of the term "made in contemplation of death," as used in the statute, in that the Tax Court applied a criterion of "general expectation of death" rather than "a particular concern, giving rise to a definite motive." The Tax Court sought to find the decedent's motive for the transfers and concluded, upon a review of all the evidence, that his motive was to make a substitute for testamentary disposition.

(b) Nor does the fact that decedent did not expressly make the transfer in trust to his grandson Ralph irrevocable, as required by California statute in order to make it so, indicate that he intended to make it irrevocable in order to control the corpus and its further disposition, as the taxpayer contends. There is no evidence whatever to show that the decedent knew the transfer would be revocable if he did not expressly make it irrevocable.

(c) The taxpayer's remaining contention is that the Tax Court should have reached a different conclusion on the evidence. Specifically, the taxpayer contends

that the Tax Court should have found the decedent was solely motivated by life motives. The Tax Court was not bound by decedent's declarations of purpose. It carefully analyzed the evidence, including the statements attributed to the decedent upon which the taxpayer relies to establish life purposes, and concluded that the decedent was motivated by a purpose to make substitutions for testamentary disposition. There was ample evidence to sustain its finding. The decedent was 84 years of age and had retired. His wife was dead. He was suffering from a disability which was the result of a severe injury to his right hip and extremity sustained some years before. The decedent had had a paralytic stroke a number of months before the transfers were made, from which, however, he had made a good recovery. He had originally left his property by will executed some years before his death in equal shares to his only son and to a grandson, the only child of his daughter who had died in childbirth. Within six months of his death, the decedent transferred about two-thirds of his property to them in the same proportion and in substantially the same manner as he had given it to them in his will, that is, he gave his son George his part outright and placed Ralph's part in trust until he should reach a given age.

II

The issue regarding the decedent's power to revoke the transfer in trust to the decedent's grandson

Section 811 (d) (1) of the Internal Revenue Code provides for the inclusion in the gross estate of property to the extent of any interest therein which was at

the decedent's death subject to a power of revocation, etc. The provision as it existed in the law prior to 1936 was amended by the Revenue Act of 1936 so as to provide that such inclusion should occur "without regard to when or from what source the decedent acquired such power." The occasion for the amendment was the decision of the Supreme Court in *White v. Poor*, and the intention of Congress in so amending the law was to make that decision ineffective for the future; otherwise, the amendment was considered to have been merely declaratory of existing law, and it was so in fact. It follows that the existence at death of a power to revoke the transfer in trust to Ralph, fell within the ambit of the statute, although such power existed only because the transfer contained no express provision making it irrevocable, as required by state statute. If, however, it be thought that Congress intended that the amendment should apply only prospectively then it applies in all cases arising subsequent thereto, and not alone to such as are similar to that prevailing in *White v. Poor*.

ARGUMENT

I

There is evidence to sustain the Tax Court's finding that the transfers in question were made by the decedent in contemplation of death

1. The applicable principles of law

So far as material here Section 811 of the Internal Revenue Code (Appendix, *infra*) provides that the value of the decedent's gross estate shall be determined

by including therein the value at the time of his death of all property—

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of * * * his death, * * *. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such [adequate and full consideration in money or money's worth] consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

In construing the term “made in contemplation of death” as used in Section 402 (c) of the Revenue Act of 1918, which is substantially similar to the contemplation of death provision of Section 811 (c) of the Internal Revenue Code, the Supreme Court, in *United States v. Wells*, 283 U. S. 102, 116–117, pointed out that the dominant purpose of Congress was to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax, citing *Nichols v. Coolidge*, 274 U. S. 531, 542, and *Milliken v. United States*, 283 U. S. 15. In holding that Congress had the power to require the inclusion in the decedent's gross estate of transfers “made in contemplation of death,” the Supreme Court in the *Milliken* case had said (p. 23):

It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property,

and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation, of death.

Hence, the Court in the *Wells* case, immediately after citing the *Milliken* case (which had been decided by it only a little more than a month before), said (p. 117):

As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort *which leads to testamentary disposition*. [Italics supplied.]

And, since the determining factor is the existence of a motive of *the sort which leads to testamentary disposition*, and not expectation or fear of immediate death, the Court in the *Wells* case said (p. 118) that the statute was not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand." The Court therefore disapproved the construction which the Court of Claims had put upon the statute (*Wells v. United States*, 39 F. 2d 998, 1008), namely that it was only where the transfer of property by gift was immediately and directly prompted by the expectation of death that property so transferred became amenable

to the burden—that it was only where contemplation of death was the motive *without which* the conveyance would not have been made that a transfer may be subjected to the tax, “that is, the expectation of death must be the direct, specific, and immediate animating cause of the transfer.”

It is important to note, however, that, while the *Wells* case made the issue entirely one of fact, it dealt only with the construction of the statute and not with the burden of proof, which rests upon the taxpayer to establish to the satisfaction of the trier of fact that the transfer was *not* made in contemplation of death. This burden is cast upon the taxpayer not only because he has to overcome the presumption of the correctness of the Commissioner's determination that the transfer was made in contemplation of death, but also because the statute expressly provides that a transfer shall be presumed to have been made in contemplation of death where it is made, as here, within two years of death. It is now well settled that, in order to sustain the burden, the decedent's representatives must prove by a preponderance of the evidence that the dominant motive for the gift was one connected with life. *Wickwire v. Reinecke*, 275 U. S. 101, 105; *Niles Bement Pond Co. v. United States*, 281 U. S. 357, 361; *Smails v. O'Malley*, 127 F. 2d 410, 412 (C. C. A. 8th); *Oliver v. Bell*, 103 F. 2d 760, 763 (C. C. A. 3d); *McGrew's Estate v. Commissioner*, 135 F. 2d 158, 160 (C. C. A. 6th).

Moreover, the statute requires the inclusion in the gross estate of the value of all transfers made in

“contemplation of death,” not merely those made “solely” in such contemplation, and, as we have said, in the *Wells* case the Supreme Court expressly disapproved the theory of the Court of Claims in the case that it must be the motive “without which” the transfer would not have been made. As a matter of fact, gifts are rarely induced by a single undiluted motive. Mixed motives induce the making of most of them, and it frequently happens that explanations clash because some of these motives are “associated with life” and others with death. 1 Paul, Federal Estate and Gift Taxation, par. 6.06, pp. 252-253. As Mr. Justice Stone, now Chief Justice Stone, pointed out in his dissenting opinion in *Heiner v. Donnan*, 285 U. S. 312, 342-343:

The donor of property which would otherwise be subject to heavy taxes at his death does not usually disclose his purpose in making the gift, even if he does not conceal it. He may not, and often does not, analyze his motives or determine for himself whether his dominating purpose is to substitute the gift for a testamentary disposition which would subject it to the tax, see *Milliken v. United States*, *supra*, p. 23; *United States v. Wells*, 283 U. S. 102, or whether it is so combined with other motives as to preclude its taxation, even though in making it the donor cannot be unaware that he, like others, must die and that his donation will, in the natural course of events, escape the tax which will be imposed on his other property passing at death. See *United States v. Wells*, *supra*. The difficulty of searching the motives

and purposes of one who is dead, the proofs of which, so far as they survive, are in the control of his personal representatives, need not be elaborated.

Hence, since whether a given transfer is made in contemplation of death depends upon the dominant motive for making the transfer, it does not suffice for the taxpayer merely to show that one of the decedent's motives was a life motive. The taxpayer must show that the decedent's dominant motive was one connected only with life, and he fails to do this where the evidence is such as to warrant a conclusion that he was also actuated by a purpose to make a substitute for testamentary disposition. If such a purpose exists and motivates the decedent in making the transfer, it matters not what other motive or motives associated with continued life may also have motivated him, the transfer is, despite the existence of such other motive or motives, made in contemplation of death within the meaning of the statute, and it is within the province of the trier of the fact so to find. In affirming a decision of the District Court which had directed a verdict for the Collector of Internal Revenue, the Circuit Court of Appeals for the Second Circuit in *First Trust & Deposit Co. v. Shaughnessy*, 134 F. 2d 941, certiorari denied, October 1, 1943, said that (p. 941) :

To make good that claim [that the transfer there in question was not made in contemplation of death] they [the executors of the decedent's will] must not only bring forward some evidence that Ballard [the decedent] did not make the gift in contemplation of death, *but they*

must carry the burden of proof on that issue: a duty which comprises more than the duty imposed by the presumption. The only question therefore was whether reasonable persons might have concluded from all the evidence that Ballard had not made the gift "in contemplation of death"; although it is true that upon that issue the plaintiffs are entitled to every intendment in their favor [since the verdict had been directed against them]. [Italics supplied.]

It follows that the taxpayer has not carried the burden of proof if his evidence establishes to the satisfaction of the trier only that a diversity of motives actuated the transfer, one of which was to make the gift as a substitute for a testamentary disposition of the property. This conclusion is not only not at variance with the *Wells* case, it is compelled thereby. Otherwise, what was there said as to the purpose of Congress to prevent avoidance of the tax and the necessity of construing the statute so as to accomplish that purpose is without apparent application.⁹ Cf. *Anneke v. Willcuts*, 1 F. Supp. 662 (Minn.).

⁹ It has been held that the transfer is taxable if the purposes associated with death form a substantial although a less compelling part of the motive. *Farmers' Loan & Trust Co. v. Bowers*, 98 F. 2d 794 (C. C. A. 2d), certiorari denied, 306 U. S. 648, rehearing denied, 308 U. S. 634; *Tait v. Safe Deposit & Trust Co. of Baltimore*, 74 F. 2d 851 (C. C. A. 4th). Certiorari was denied in *Farmers' Loan & Trust Co. v. Bowers*, *supra* (known as the *Astor* case), although conflict was asserted between it and the decision of the Circuit Court of Appeals for the Third Circuit in *Denniston v. Commissioner*, 106 F. 2d 925. The decision of the Circuit Court of Appeals for the Second Circuit has never successfully been challenged. See also the decision of the Circuit Court

Indeed, the Supreme Court has apparently recognized that the effect of the *Wells* case is to cast such burden upon the taxpayer. For in *McCaughn v. Real Estate Co.*, 297 U. S. 606, 607, the Court sustained a finding of the District Court that the transfer was made in contemplation of death, although the plaintiffs had adduced evidence showing that the decedent's purpose in making it was "to conserve the estate against mistakes, errors of judgment or inexperience of its beneficial owners." See *Land Title & Trust Co. v. McCaughn*, 7 F. Supp. 742 (E. D. Pa.). The Supreme Court sustained the finding because, as it said (p. 607), in the trial court's view, the plaintiffs had failed to show that the motive which induced the transfer, whatever it was, was not of the sort which leads to testamentary disposition, and, consequently had failed to meet the burden of proof placed upon them by the statute. It will be observed that, as the Supreme Court said (*loc. cit.*), the District Court had (similarly as the Tax Court here (R. 38-40)), concluded that the decedent's motive was "not in the least inconsistent with an intention to make its [the] transfer a substitution for testamentary disposition." In other words, despite the fact that there was evidence, which was not directly contradicted, that such purpose existed as a motivating factor, the trier was deemed to be free from all the evidence to find

of Appeals for the Second Circuit on the first appeal. *Bowers v. Farmers' Loan & Trust Co.*, 68 F. 2d 916, certiorari denied, 293 U. S. 565, 296 U. S. 649, 299 U. S. 582, which forms the basis of the decision of the Circuit Court of Appeals for the Second Circuit on the second appeal.

that death was contemplated. And this was so, as the Supreme Court further pointed out, even though the trial court had also expressly found (p. 607) that the transfer was not made "under any consciousness or belief or apprehension that death was imminent." This left the finding to be sustained virtually alone on evidence which showed that at the age of 78, within two years of death, the decedent, a physician, had made a transfer of his property in trust for the benefit of his children and their wives and descendants valued at upward of \$670,000.

The same principle was applied by the Circuit Court of Appeals for the Eighth Circuit in *Smails v. O'Malley*, *supra*, p. 414, where the court held that the written declaration of the decedent that she did not want to be burdened with "looking after business matters," did not, as the appellants there contended, compel the inference that she must be held not to have made the gifts in contemplation of death. Similarly, in *Turner v. Hassett*, 37 F. Supp. 996, 998 (Mass.), the District Judge found the decedent's transfer to have been made in contemplation of death, saying that he was not satisfied upon all the credible evidence that the decedent's asserted motives were the controlling motives, one of these being—

because he thought, for one thing, it would be a good thing for Mrs. Morgan to learn how to handle securities, and for another thing he wanted to make a gift to her, as far as he could, because he understood that the gift tax was going to be increased and he wanted to take advantage of the time before then.

See, also *Oliver v. Bell*, *supra*, p. 763. The same principle has also been applied by the Supreme Court in other fields of the tax law where purpose is the factor which determines the fall of the tax. See *Helvering v. Chicago Stock Yards Co.*, 318 U. S. 693, 699, where it was said that it is sufficient if the purpose to avoid surtax upon the corporation's shareholders "induced, or aided in inducing," in that case, the continuance of the practice of accumulating earnings and profits.

It is, therefore, pointless for the taxpayer to argue, as he does (Br. 40-42), that the ultimate finding of the Tax Court that the transfer was made in contemplation of death is merely a conclusion of law, or a determination of "mixed law and fact," based on the Tax Court's finding of primary evidentiary or circumstantial facts; that as such it is subject to judicial review, and that, on such review, the court may substitute its own judgment for that of the Tax Court. *Helvering v. Tex-Penn Co.*, 300 U. S. 481, is not authority for that proposition. See *Dobson v. Commissioner*, decided by the Supreme Court December 20, 1943 (1944 C. C. H., par. 9108). Moreover, this Court denied a similar contention of the Government in *Commissioner v. Cecil B. DeMille Productions*, 90 F. 2d 12, certiorari denied, 302 U. S. 713. And, in *J. M. Perry & Co. v. Commissioner*, 120 F. 2d 123, this Court specifically held, as against the taxpayer's contention, that such an ultimate finding is a pure finding of fact. It is true that these cases involved the section which imposes the penalty tax upon corporations accumulating earnings and profits for the purpose of

enabling their shareholders to avoid surtaxes, but, as has already been stated, the taxability in such cases likewise depends upon purpose, namely, the purpose of the corporation in making its accumulations.

In any event, it is now well settled that the question whether a given transfer was made in contemplation of death is purely one of fact, and that on that question the finding of the trier of fact is conclusive, if there is evidence to sustain it, whether the trier be a court (*McCaughn v. Real Estate Co.*, *supra*), or the Board of Tax Appeals (now the Tax Court) (*Colorado Bank v. Commissioner*, 305 U. S. 23). See also, e. g., *Flack v. Holtegal*, 93 F. 2d 512 (C. C. A. 7th); *Smails v. O'Malley*, *supra*; *McGrew's Estate v. Commissioner*, *supra*. Cf. *Helvering v. Rankin*, 295 U. S. 123, 131-132; *Hulburd v. Commissioner*, 296 U. S. 300, 306; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40; *Palmer v. Commissioner*, 302 U. S. 63, 70; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 294; *Helvering v. Lazarus & Co.*, 308 U. S. 252, 254-255; *Helvering v. Kehoe*, 309 U. S. 277, 279; *Wilmington Co. v. Helvering*, 316 U. S. 164. The error of the appellate court in not limiting its review to determining whether there is evidence to support the finding has again and again, and in no uncertain terms, been condemned by the Supreme Court. Thus, in the *Nat. Grocery Co.* case, *supra*, the Court said (pp. 294-295):

The Court of Appeals, instead of limiting its review to ascertaining whether there was evidence to support the Board's findings and decision, made on all the evidence, as upon a trial *de novo*, in effect, an independent determination

of the matters which had been in issue before the Board. The court was without power to do so. *Helvering v. Rankin*, 295 U. S. 123, 131-132. To draw inferences, to weigh the evidence and to declare the result was the function of the Board. *Hulburt v. Commissioner*, 296 U. S. 300, 306; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40.

Moreover, as the Supreme Court pointed out in *Helvering v. Lazarus & Co.*, *supra*, a finding is conclusive on the courts although the evidence on the subject permits conflicting inferences. To the same effect is *Palmer v. Commissioner*, *supra*; *Wilmington Co. v. Helvering*, *supra*, pp. 167-168; *Oliver v. Bell*, *supra*. It is of no moment that there may be substantial evidence which would support a contrary finding to that made by the Board.

2. An analysis of the facts

(a) The contention of the taxpayer leaves no doubt, however, that we are here dealing with merely another attempt to induce an appellate court to try a contemplation of death case *do novo*. To be sure, the taxpayer asserts (Br. 21) that the decision of the Tax Court is founded upon an erroneous interpretation of the term "made in contemplation of death," as used in the statute, in that the Tax Court applied a criterion of "general expectation of death" rather than a "particular concern, giving rise to a definite motive." The taxpayer's only iteration of this assertion indicates, however (Br. 24), that it is based solely on the statement in the Tax Court's opinion (R. 41) that "It would be closing our eyes to the

obvious to hold that thoughts of death did not enter into his [the decedent's] mind and motivate the transfers." But this quotation furnishes its own refutation of the taxpayer's contention. General thoughts or expectation of death obviously lose their characteristics as such if they become so specific as to motivate transfers. Indeed, it is this fact which differentiates general thoughts of death from the "contemplation of death" to which the statute refers. This is the rationale of the *Wells* case. It is for this reason that it becomes important to ascertain whether the thought of death has become an activating factor in making the transfer; and that it has become such factor is said to be established if the decedent's purpose is to make a transfer which is in its nature a substitute for a testamentary disposition. The applicable Treasury regulation (Section 81.16 of Regulations 105, promulgated under the Internal Revenue Code (Appendix, *infra*)), recognizes this, for it specifically provides in this connection that—

A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, *or as a substitute for a testamentary disposition of the property*, or for any other motive associated with death. [Italics supplied.]

There can be no question whatever, we think, that the Tax Court correctly understood the governing principles of law and correctly applied them. This is simply evidenced by its discussion of the principles in their application to the facts. Thus, as regards the test, the Tax Court, in its opinion, said (R. 35):

“Contemplation of death,” as used in the statute, requires that the triers of fact apply a subjective test and attempt to ascertain from the available facts “the state of mind” of a donor whose lips have been sealed by death. *United States v. Wells*, 283 U. S. 102.

And, as regards the burden of proof, the Tax Court said (R. 37):

The burden was on the petitioner to show that decedent's gifts in December, 1938, and January, 1939, were motivated by impulses primarily associated with life. *United States v. Wells*, *supra*.

In turn, the Tax Court took up each of the reasons advanced by the taxpayer for the transfers to both Ralph and George and explained why, in its judgment, these did not satisfactorily explain the gifts (R. 38-40), concluding that (R. 40):

They [the gifts to George], like the gifts to Ralph, appear rather to have been made as substitutes for and in lieu of testamentary disposition of his property.¹⁰

Further, the Tax Court discussed the decedent's age and health and, in connection therewith, said (R. 41) that, while it was no doubt true that the decedent was of a jovial disposition and did not discuss death at any length with those with whom he associated,

he must have known that the sands of life were fast running out, that his life expectancy was short and that it was highly desirable his house be put in order.

¹⁰ Hereafter we shall endeavor to show how the Tax Court rationalized the evidence of the decedent's alleged motives with its finding that his dominant motive was the thought of death.

And, in conclusion, the Tax Court said that (R. 41):

*It would be closing our eyes to the obvious to hold that thoughts of death did not enter into his mind and motivate the transfers. While age alone is not a decisive test, Flack v. Holtegel, supra, it may well tip the scales where other facts strongly point to testamentary disposition.*¹¹ [Italics supplied.]

In fact, the entire discussion of the case by the Tax Court shows a painstaking analysis of all the evidence in the case, including the decedent's alleged dominant motives, his age and mental and physical condition.

(b) Another point is made by the taxpayer, namely, that (Br. 9), the trust which the decedent declared for Ralph's benefit, although not expressly made irrevocable, was, nevertheless so, because under Section 2280 of the Civil Code of California (Appendix, *infra*) a trust is revocable unless made expressly irrevocable by the instrument creating it. From this premise the taxpayer argues (Br. 10) that the consequent "retention" by the decedent of the power to revoke "looked to further activity, management and discretion which was necessarily associated with motives of life." While it is not entirely clear what is here meant, we think this means to say that the decedent intentionally failed to include a provision in the trust expressly making it irrevocable in order that he might be in position to revoke it, or effect some

¹¹ As has already been stated, the italicized part of the Tax Court's language here quoted was cited by the taxpayer (Br. 24) as evidencing the fact that the Tax Court applied an erroneous rule of law.

change in the beneficiary, or in his status, or in the status of the property.

But there is no evidence that the decedent's failure to insert a provision in the trust making it irrevocable sprang from that purpose. To bridge this gap in the evidence, the taxpayer suggests that the Tax Court draw an inference that this was the decedent's purpose. Thus, the taxpayer says (Br. 9-10) that it is reasonable to assume, even if the decedent's attorney Johnston was not directed by him to make the agreement irrevocable, that the attorney fully advised the decedent of the legal effect of not specifically making it revocable and that the decedent approved this retention of the power in himself to revoke the agreement at any time. Of course, this Court is without power to draw such inference, even if it were a permissible one, which we submit it is not. It is far more likely that neither the decedent nor his attorney had in mind the provision of Section 2280 and did not apprehend or regard its significance. There is no evidence from which it could be reasonably inferred that the matter of revocation was ever called to the decedent's attention or considered by him, or that the reservation of a right to revoke gave him the least concern; and, in any event, the reservation of a right to change one's mind would not alter the character of a gift otherwise made in contemplation of death.

(c) Aside from the foregoing assertions of the misapplication by the Tax Court of legal principles to the facts, the taxpayer merely contends that the Tax Court should have reached a different conclusion

on the evidence. Stated in its ultimate terms, the taxpayer's contention is that, instead of finding that the transfers were motivated by a purpose to make gifts in lieu of a testamentary disposition, it should have found that they were motivated solely by life purposes.

As regards the gifts to Ralph, the taxpayer contends (Br. 12-16) that the Tax Court should have found that these were motivated solely by a purpose to assure him an education at Stanford University, against the opposition of Ralph's father and stepmother, and to that end (Br. 13), in the language attributed to the decedent by his lawyer Johnston, "to fix it so the boy would be absolutely independent and that his father or his stepmother would have nothing to do with the boy's business." The taxpayer is concerned to establish this as the decedent's sole motive for the gifts to Ralph, for he contents himself with claiming (Br. 16) that, with this motive established, the gifts to George are seen to be made merely in order to equalize the ones to Ralph. Aside from the provisions of the will, this contention is based upon the following testimony of George (R. 159):

Q. Did you at that time [December 20, 1938, when the decedent declared the trust for Ralph] receive securities for yourself?

A. Yes. And my father said to me "Now, George, I want you to take the same comparable amount for yourself." Which I did. But there is a difference of \$290.00 there, and ninety-eight cents. And that was in the market value of some bonds.

An additional motive for the gifts to George is, however, assigned (Br. 17), namely, that "the decedent had followed a liberal policy of making gifts to his son."

The taxpayer's final contention is—a whole subsection of the brief being devoted to its elaboration (Br. 22-35)—that the decedent's mental and physical condition negatives the idea that the thought of death motivated the transfers.

Contrary to the taxpayer's assertion (Br. 10), the Tax Court did not disregard the statements which the decedent's attorney and George attributed to the decedent regarding his reasons for making the gifts. It is true, as the taxpayer infers (*loc. cit.*), that the Tax Court gave the alleged reasons no probative force, if by that is meant that the Tax Court did not regard them as the direct motive or motives for the transfers and therefore did not give them force and effect as such. For the Tax Court concluded (R. 37) that "the time and manner in which the transfers were made indicate that they were substitutes for testamentary dispositions of decedent's property," pointing out, in this connection (R. 38), that it was a significant fact in making the gifts that the decedent followed the ~~intended~~ ^{intention expressed by} expression of his will of dividing his property *per stirpes*. But this is not to say, as the taxpayer does (Br. 10), that thereby the Tax Court necessarily impugned the veracity of the decedent or, if it did, that it did so without justification. For, in reaching the conclusion it did, the Tax Court examined in detail (R. 38-39) the contentions made by the taxpayer and

the evidence relied on that the gifts to Ralph were motivated solely by a desire to insure him an education at Stanford University and (R. 39-40) those to George solely by a desire to give him amounts equal to those given to Ralph and of carrying out a long standing policy of making liberal gifts to George.

As regards the alleged motive for the gifts to Ralph, the Tax Court obviously did not take the position that the decedent did not make the statements attributed to him by his attorney and son, for the Tax Court in its opinion said (R. 38):

We do not doubt that decedent wanted Ralph to become "a good business man and not a fiddler," as some of the witnesses stated, and that his intention was to make Ralph "absolutely independent."

It was merely the Tax Court's view (*loc. cit.*) that this did not satisfactorily explain why the decedent should have advanced the time of enjoyment by Ralph of such a substantial portion of the property. In this connection, the Tax Court pointed out (R. 38-39) that the record was devoid of any intimation that the decedent was endeavoring to school his grandson in handling money, the inferences being to the contrary since the major portion of the property given Ralph was to be administered by his uncle as trustee, who was to pay out of its income only such amounts as he should deem necessary for Ralph's support, education, and maintenance. The Tax Court considered (R. 38-39) that, inasmuch as the trust created for Ralph was in essence the same as the trust which was to be set up after the decedent's death under the terms of his

will, it was difficult to see why it was created, if it were not for the reason which the Commisisoner had determined.¹²

As regards the taxpayer's contention that the gifts to George were motivated merely by a desire to equalize the gifts between Ralph and him, the Tax Court said (R. 39) such intention was also clearly evidenced by the terms of the decedent's will and the fact the decedent provided that each should receive approximately the same amount of his property when he made the gifts in December, 1938, and January, 1939, showed that there was no change in the plan and obviously did not explain the decedent's motive in advancing the time of the enjoyment of George's share of the property.

Turning to the other motive assigned for the gifts to George, namely, that these were made as a continuation of a long standing policy to make liberal gifts to him, it would seem that this reason is inconsistent with the first reason assigned therefor, that they were made to equalize gifts between Ralph and George. The policy of equalizing the gifts between Ralph and George obviously originated subsequent to the 1932 will, which,

¹² In a substantially similar situation, the District Court in *Land Title & Trust Co. v. McCaughn*, 7 F. Supp. 742, 744 (E. D. Pa.), said:

Even assuming that it is the dominant or sole purpose, I can think of no reason which would require it to be carried out by a deed rather than by a will, unless it be that the donor mistrusts his own ability to take care of his property until his death and wishes to put it out of the way of dissipation by himself as well as his heirs. I am sure that no one would suggest that this was the case with Dr. MacFarlan.

it will be remembered, was the one that provided merely for a spendthrift trust for George. The policy to equalize gifts was first carried out in the 1935 will, although it appears from lawyer Johnston's testimony that the decedent had discussed his intention to make equal gifts to Ralph and George in 1933, 1934, and 1935. (R. 73.) But from 1935 to 1938 there was no policy to make gifts *inter vivos*. Of course, no such policy existed between 1930 and 1935. And, while there is an explanation why there was no policy to make *inter vivos* gifts between 1930 and 1935, namely, because of George's bankruptcy, there was no explanation why there was no such policy from 1935 to 1938. The only evidence we have as to the decedent's policy, or rather lack of policy, to make *inter vivos* gifts to George and Ralph between the date of the execution of his 1935 will and the date of the 1938 gifts is the fact that he made no such gifts to them between those dates (except that he gave \$500 to Ralph to start him in Stanford University), but only a codicil to his will. Such continuity of a purpose to make gifts to George as may have existed up to 1930 was therefore clearly broken not only by George's bankruptcy, but by the fact that Ralph came into the picture as an equal subject of the taxpayer's bounty. In any event, the motive now attributed by the taxpayer to the decedent of making the gifts to Ralph—which carried the contemporaneous gifts to George in their wake—had nothing whatsoever to do with the decedent's motive for the gifts made to George prior to 1930. Accordingly, the Tax Court concluded—correctly, we think—that the gifts to George in 1938 and 1939 could not be attributed to a long

continued policy or practice, but that they, like the gifts to Ralph, appeared rather to have been made as substitutes for and in lieu of testamentary disposition of his property. (R. 39-40.)

Clearly, the Tax Court was not bound to base its ultimate finding solely on the testimony of the decedent's attorney Johnston and his son George regarding the statements which the decedent had made as to the reasons why he was making the gifts. Indeed, the trier of the fact is never bound by the declaration of a purpose made by the interested party, but is free to find from all the facts what the real intention was. See *Helvering v. Nat. Grocery Co.*, *supra*, p. 295; *Helvering v. Stock Yards Co.*, *supra*, p. 707; *Rand v. Helvering*, 77 F. 2d 450, 450 (C. C. A. 8th); *United States v. Washington Dehydrated Food Co.*, 89 F. 2d 606, 609 (C. C. A. 8th). The Tax Court is well aware of this principle and has again and again been guided by it, often with the approval of the courts. See, e. g., *William C. DeMille Productions, Inc. v. Commissioner*, 30 B. T. A. 826, 829; *Reynard Corp v. Commissioner*, 37 B. T. A. 552, 563; *R. L. Blaffer & Co. v. Commissioner*, 37 B. T. A. 851, 856, affirmed, 103 F. 2d 487 (C. C. A. 5th), certiorari denied, 308 U. S. 576, rehearing denied, 308 U. S. 635; *W. S. Farish & Co. v. Commissioner*, 38 B. T. A. 150, 158, affirmed, 104 F. 2d 833 (C. C. A. 5th); *Shoenberg v. Commissioner*, 30 B. T. A., 659, 661, affirmed, 77 F. 2d 446 (C. C. A. 8th), certiorari denied, 296 U. S. 586; *Seymour v. Commissioner*, 27 B. T. A. 403, 405; *Powell v. Commissioner*, 34 B. T. A. 655, 659.

It is, moreover, wholly immaterial that the Tax Court did not say in so many words that it did not believe the decedent's declarations of purpose in making the gifts to Ralph, if the decedent thereby intended to be understood as implying that he did not intend to make the transfers as a substitute for testamentary dispositions. It was unnecessary for the Tax Court to state that it did not believe the decedent in his declarations of purpose if such was their purport. To say, as the Tax Court did, that the testimony was not satisfactory, or that it did not satisfactorily explain why the decedent should have advanced the time of enjoyment by Ralph of such a substantial portion of the property (R. 38), is more polite and less offensive, and at the same time equally sufficient. *Stone v. United States*, 164 U. S. 380, 382.

Furthermore, as the Tax Court said (R. 41), the decedent quite obviously was tax conscious, as was indicated by the fact that he deliberately divided the gifts between 1938 and 1939 in order to minimize his tax liability. See George's testimony. (R. 162.)

It follows that the evidence of the decedent's statements regarding his intentions does not necessarily render irrational a conclusion based upon all the evidence that the transfers were made in contemplation of death. Proof of that is more often than not to be found in the character of the gifts and the circumstances surrounding them—and that is precisely the case here.

The decedent was a man of advanced age. He was 84 years old and was suffering from an incurable disability, the result of an accident sustained several

years before. He was retired. His wife had died some years before and his only daughter had died in childbirth. Her only child, a boy, Ralph, had lived with and been brought up by the decedent and his wife. A number of years before his death, the decedent had determined to leave his property in equal shares to his son George and his grandson Ralph. To carry out that purpose, the decedent had made a will in 1935 giving George one-half of his property outright and placing the balance in trust for Ralph, providing that the income be used for his maintenance and education until the last of the corpus was distributed to him at 35. About three years later, ostensibly in order to provide a college education for Ralph (which decedent could himself have provided until his death and which he had thereafter provided for as effectively by his will), and to do so in such fashion that neither his father who had remarried nor his stepmother could get his hands on it (although they could no more have done so had the transfer not been made and the property been left to pass under the decedent's will), the decedent in 1938 transferred in trust for Ralph property valued at \$79,000. At the same time, the decedent made a similar gift to George outright. Some time before that, in the spring of the same year, the decedent had had a paralytic stroke, the result of a fall in the bathroom. He was prone to fall because of the weakened condition in which the accident already mentioned had left his right hip and leg. Within a month after the December, 1938, transfers, that is, some time in January, 1939, the decedent made an additional gift

outright to each of about \$23,000. The reason given for making these gifts in 1939 instead of including them in the 1938 gifts is that he could thereby make a tax saving. At the same time he gave his automobile to Ralph. Altogether, these gifts aggregated some \$240,000 and represented more than 60 per cent of the decedent's estate, so that only about \$142,000 passed under the terms of his will. The decedent died in June, 1940, of a hemorrhage in the region of his old injury, apparently resulting from another fall.

We submit that it can not be said that there is no evidence to support a finding that these transfers were made "in contemplation of death." This is, of course, not to say that this Court need agree with the finding. But it is not concerned with what it may regard as an error of fact on the part of the Tax Court, although we think that none such has been committed by it. This Court must uphold the decision of the Tax Court upon the point in issue, even though, if privileged to indulge in its own inferences, its conclusions would controvert those of the Tax Court. *McGrew's Estate v. Commissioner, supra*, p. 162. It has no right to substitute its own judgment upon the facts for the finding of the trier of the facts so long as the findings are not inconsistent with the evidence and do not lack support in substantial evidence. *Flack v. Holtegel, supra*, p. 515. A finding of fact by the trier of the facts, if based upon substantial evidence, is not to be set aside upon appeal, even if upon examination of the evidence the court might draw a different inference. *Smails v. O'Malley, supra*, p. 412. There the

court also stated that on motion for directed verdict by any party (which presents the identical question presented on appeal), the court is required to consider the substantial evidence and all the inferences reasonably to be drawn therefrom in the light most favorable to the other party and, if fair-minded men may draw different inferences from such evidence, the question is one of fact for the jury (or judge sitting without a jury, or the Tax Court) and not one of law for the court.

Little need be said with respect to the taxpayer's somewhat extended argument as to the decedent's good health and cheerful disposition. (Br. 21-35.) To be sure the Tax Court did not take quite the taxpayer's view thereof. However, even if it had taken the same view, it would have availed the taxpayer nothing here. The decedent may have contemplated his death in the statutory sense even though he was in excellent health and did not apprehend death as imminent. As we have heretofore said, this was precisely the situation in *McCaughn v. Real Estate Co.*, *supra*. In that case the Supreme Court stated that the District Court, in referring to the decedent's physical condition, had said the evidence showed that, at the time of the transfer, the decedent was 78 years old, unusually vigorous and clear minded and, except for a condition common in men of his age, in good health, and that the most that could be claimed for the evidence was that it established, as the District Court had specifically found (p. 607), that the transfer was not made "under any consciousness or apprehension that death was imminent."

It is therefore respectfully submitted that there is no basis upon which this Court can interfere with the finding of the Tax Court that the transfers in question were made in contemplation of death.

II

The value of the property transferred by the decedent in trust for the benefit of his grandson Ralph was also includible in the decedent's gross estate because he had reserved the power to alter, amend, revoke, or terminate the trust

Section 811 (d) (1) of the Internal Revenue Code (Appendix, *infra*) provides that there shall be included in the gross estate the value of property to the extent of any interest therein of which the decedent has at any time made a transfer without adequate and full consideration, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to a change through the exercise by the decedent of a power to alter, amend, revoke, or terminate, *without regard to when or from what source the decedent acquired such power*. The italicized words were added to the section by way of an amendment to the prior law by Section 805 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648. Their significance is hereafter explained. In answering the taxpayer's contention, we shall first assume, as apparently he did, that no significance is to be attached to them here.

The Commissioner had determined that the transfer in trust for the benefit of the decedent's grandson Ralph, made December 20, 1938, of property of the value of \$79,001.53, being a part of the property he

had held includible therein under Section 811 (c), was also includible in the gross estate because the transfer was subject at the date of the decedent's death to a power of revocation. The Tax Court did not decide the question whether this transfer was likewise includible therein under Section 811 (d) (1). It did no more than refer to the Commissioner's determination in respect thereof. (R. 25.) That it did not decide the question is undoubtedly due to the fact that it sustained the inclusion of the value of all the 1938 and 1939 transfers because it considered they were made in contemplation of death, within the purview of Section 811 (c). The Tax Court did, however, make a finding that (R. 29):

No power to change, alter, or amend the trust was reserved in the settler.

Presumably, this meant merely to say that no such power was "expressly" reserved, and not that the power to revoke did not exist, for it did exist under Section 2280 of the Civil Code of California, and that section was no doubt called to its attention. This section provides that, unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. But, if the section was not called to the Tax Court's attention, and it meant to say that the transfer was not subject to revocation at the date of the decedent's death, then the finding is obviously in error; for, by the instrument creating the trust, it was not expressly made irrevocable as required by Section 2280. That suffices to bring the

transfer within the statute. It is not necessary that the power of revocation be expressly reserved.

The provisions of Section 811 (d) of the Internal Revenue Code were first enacted as Section 302 (d) of the Revenue Act of 1924. In explaining the provision H. Rep. No. 179, 68th Cong., 1st Sess., p. 28, (1939-1 Cum. Bull. (Part 2) 241, 261) said:

By this subdivision if the decedent had the power at the time of his death to change the enjoyment of a property interest, which he had transferred, or with respect to which he had created a trust, such interest is to be included for estate-tax purposes in his gross estate. Likewise, if the decedent had relinquished such a power in contemplation of death, except by a sale for a fair consideration, the property interest over which he had such a power is to be included in his gross estate.

Even though the decedent has made the transfers specified in this subdivision, he has retained substantial control over the disposition of the property, through the power to change the enjoyment thereof. Such property interests should therefore fairly be taxed as part of the decedent's estate, particularly since, by virtue of his death, the substantial interest which he had has been wiped out, and to the same extent the property interest of the legal title holder, his transferee, has been increased. This provision is in accord with the principle of section 219 (g) of the bill which taxes to the grantor the income of a revocable trust.

The same explanation will be found in S. Rep. No. 398, same Congress and Session, pp. 34-35 (1939-1 Cum. Bull. (Part 2) 266, 289).

There is, therefore, nothing in the statute, even as it existed prior to the 1936 amendment, or in its legislative history, to indicate that a power of revocation must be expressly reserved in order to come within the ambit of this section. Moreover, speaking with reference to the statute levying a gift tax, the Supreme Court in *Burnet v. Guggenheim*, 288 U. S. 280, 286, said:

It [the statute] is aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall.

We think this clearly means to say actually beyond recall, regardless of the manner in which it is so placed.

Here the gift was *not* beyond recall because the decedent had not renounced the power to recall it. It would, therefore, seem that, under the *Guggenheim* case, a gift tax could not have been imposed in respect of the transfer, at least not until the power to revoke was released. Not having been released, it was taxable at death. The Board of Tax Appeals has expressly so held in the case of *Keiffer v. Commissioner*, 44 B. T. A. 1265, a case arising under Section 302 (d) (1) of the Revenue Act of 1926, as amended by Section 401 of the Revenue Act of 1934. In a lucid opinion in which the applicable authorities are reviewed, the Board cited, among others, its own decision in *Allen v. Commissioner*, 38 B. T. A. 871, upon which the taxpayer relies (Br. 36), but which, as the Board pointed out, had been overruled by the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Allen*, 108 F. 2d 961, certiorari denied, 309

U. S. 680. In that case the Board had held that a gift in trust absolute on its face, made by an infant, was not subject to the gift tax after he had attained majority, since Section 501 (c) of the Revenue Act of 1932 applied to a power to revest *retained* in the trust instrument and not to the right given by law to infants to avoid their gifts. The Board there, as the taxpayer here, relied upon the distinction made by the Supreme Court in *Helvering v. Helmholtz*, 296 U. S. 93, between a power to revoke and a condition which the law imposed. But, as the Circuit Court of Appeals for the Third Circuit pointed out in its opinion reversing the Board (pp. 964-965), the *Helmholz* case actually dealt with an entirely different situation and problem. The trust there was created in 1918. When the decedent died in 1926, the Revenue Act of 1926 was in effect, Section 302 (d) of which provided for the inclusion in the gross estate of the value of a transfer, whether in trust or otherwise, wherein the enjoyment was subject at the date of death to any change through the exercise of a power, either by the decedent alone or with any other person, to alter, amend or revoke. The donor had reserved no power to revoke the instrument, but it was therein provided that the trust should terminate if all the beneficiaries, including the donor, delivered a writing to the trustee signed by all declaring such purpose. The court said that such power of revocation was not one contemplated by the statute; that the contention that it was overlooked the essential difference between a power to revoke, alter or amend and a condition which the law imposed, namely that imposed by the general rule that

all parties in interest may terminate a trust. In other words, as the Circuit Court of Appeals for the Third Circuit pointed out (*loc. cit.*) the power came to her as one of the beneficiaries and not as the settlor. But we are not here dealing with a general rule that all beneficiaries acting conjointly may revoke a trust; we are dealing with a power vested in the decedent alone by reason of his failure to make the transfer expressly irrevocable, as he was required by state statute to do if he wished to make it irrevocable. The Board also referred to the decision of this Court in *Hughes v. Commissioner*, 104 F. 2d 144, the rationale of which appears to sustain the Board's view.

Nor is the case of *White v. Poor*, 296 U. S. 98, upon which the taxpayer also relies, in point here. That case was also distinguished by the Circuit Court of Appeals for the Third Circuit in the *Allen* case, *supra*, *loc. cit.* There the trustor had designated herself and two others as trustees with power to terminate the trust. She had reserved no power to revoke. The trustor had resigned as a trustee, but upon the resignation of her successor had been appointed as one of the trustees. The court held that the power acquired by her as a result of such appointment was not one which could be said to have been reserved by her, assuming that she had originally reserved it as a trustee designated under the trust. Incidentally, speaking of the decision of this Court in *Hughes v. Commissioner*, *supra*, which the taxpayer says contains merely an *obiter dictum* against his contention, the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Allen*, *supra*, said (pp. 965-966):

It is implicit in the case of *Hughes v. Commissioner*, 9 Cir., 104 F. 2d 144, that a power to revoke a transfer in trust, arising by operation of law, comes within the purview of Section 501 (a) and (c) of the Revenue Act of 1932. In that case, other than for the settlor's power to revoke which was imposed by a California statute, the transfer was complete and irrevocable as a gift, no power to revoke having been reserved by the settlor in his trust indenture. Under the law of Massachusetts the trust was irrevocable. The court held that the law of Massachusetts (the situs of the trust) governed in determining when the transfer became consummate as a gift. Nonetheless, the implication of the court's reasoning is plain. If the law of California (the domicile of the settlor) had governed, the effect of the statutorily imposed power of revocation in California would have been to suspend the taxability of the transfer, as a gift, until the power, which the law there imposed, had been extinguished or terminated.

We think that is a correct estimate of the decision.

Of the remaining three cases cited by the taxpayer in support of his contention (Br. 39), only *Newhall v. Casey*, 18 F. 2d 447 (Mass.), and the decision of this Court in *United States v. Goodyear*, 99 F. 2d 523, require any consideration. The *Newhall* case arose under the Revenue Act of 1916, which did not contain the provisions here in question. The question there was whether a gift by a Massachusetts husband to his wife came within the purview of the "to take effect at death" provisions of Section 202 (b) of the Revenue Act of 1916. It appears that under what the

court called a peculiar doctrine which had survived in Massachusetts longer than elsewhere, and had since been abolished by statute, a gift by a husband to his wife remained revocable and subject to the claims of his creditors until his death. The court held that, despite this, it was not includible in the decedent's gross estate. Aside from the fact that the case did not arise under similar provisions of the statute here under consideration, but as we have said, under the "to take effect at death" provision, the power to revoke under the rule stated was absolute. It was not, as here, left to the donor's discretion whether the transfer should be revocable or not. Hence, if the transfer there was not to be regarded as a gift, the husband could not make a gift at all. In any event, it is not to be regarded as supporting the taxpayer's contention here. The case has, moreover, been cited only once and that in an income tax case. *Walker v. Commissioner*, 6 B. T. A. 1142, 1151. This case involved the question whether a donation by a husband to his wife of an interest in an oil and gas lease, constituting Louisiana community property, vested in the wife the husband's interest therein so that the gain from subsequent sale thereof was taxable to her despite the fact that under Louisiana law the gift was revocable until death. The Board held that the gain was nevertheless taxable to her. Incidentally, the *Walker* case has itself never been cited as an authority for that proposition. And this brings us to a consideration of the decision of this Court in *United States v. Goodyear, supra*.

But the situation in that case is not at all comparable to that presented here. While that case involved an assignment by a husband to his wife of his interest in community property acquired before the 1927 amendment of the Civil Code of California, the value of the property transferred was held not to be includible in his gross estate under Section 302 (d) merely because he retained the rights of management and control under the statute. The *ratio decidendi* of the majority opinion is that the husband did not retain possession or enjoyment of the property until his death merely because, in virtue of the statute, he retained the management and control thereof until his death. The court pointed out that any disposition of the property which the husband might have made must have been with his wife's consent and for a valuable consideration. It was, however, the view of Judge Stevens who dissented that under California law the husband did retain the power to "alter" the corpus of the transferred property in several important respects, some without the consent of his wife and some only with her consent, and that this fitted directly into the provisions of Section 302 (d) of the 1926 Act. Obviously, if the majority of the court had agreed with this construction of the California statute, it would not have arrived at the conclusion it did.

So far, we have assumed that the words which were added to Section 302 (d) (1) of the Revenue Act of 1926, as amended, by Section 805 of the Revenue Act of 1936, set out in the opening paragraph of this point of our argument, had no significance here. These words qualify the power of revocation and provide

that the value of property subject to such power shall be included in the gross estate "without regard to when or from what source the decedent acquired such power." This assumption is, however, erroneous, for the amendment was intended to be declaratory of existing law, except in so far as situations similar to those involved in *White v. Poor, supra*, were concerned. It is to this end that subdivision (b) of Section 805 of the 1936 Act provided:

Except in the case of transfers made after the date of the enactment of this Act, no interest of the decedent of which he has made a transfer shall be included in the gross estate under such section 302 (d) (1) unless it was includible under such section before its amendment by this section.¹³

Thus, in short, the primary purpose of the amendment was to cancel the effect of the decision of the Supreme Court in *White v. Poor, supra*. This is made entirely clear by its legislative history.

The amendment was first inserted in H. R. 12,793, 74th Cong., 2d Sess., which is not the Revenue Bill of 1936. The Revenue Bill of 1936 was H. R. 12,395 74th Cong., 2d Sess. H. R. 12,793 was a bill to amend the administrative provisions of the internal revenue laws, and dealt primarily with refunds of amounts

¹³ Compare subdivision (b) of Section 805, as quoted in the text, with the language as it appeared in the bill as it passed the Senate, subdivision (b) of Section 807, which is as follows:

The amendment by subsection (a) of this section shall not apply to decedents dying prior to the date of the enactment of this Act.

collected under the Agricultural Adjustment Act. It also contained, however, certain miscellaneous amendments to the revenue acts, among which was Section 206. This section amended Section 302 (d) (1) of the Revenue Act of 1926, as amended. The last form of the bill was the form in which it was reported to the House. Its provisions were then, for the first time, incorporated in the Revenue Bill of 1936 (H. R. 12,793), namely by way of an amendment made to the bill on the floor of the Senate. See 80 Cong. Record, Part 8, p. 9073. It appeared in that bill as Section 807, and is known as the Walsh Amendment. This section in its turn, became Section 805 in conference, the section being then amended, but apparently only in order to clarify its language.⁴ The amendment made in conference, however, was not explained in the conference report on the bill. See H. Conference

⁴ Section 807 (a) of the Revenue Bill of 1936 (H. R. 12,395) as it passed the Senate, reads as follows, amendments made by the Senate in Section 206 of H. R. 12,793, being shown in stricken-through type and italics:

SEC. 807. ESTATE TAXES—REVOCABLE TRANSFERS.

(a) Section 302 (d) (1) of the Revenue Act of 1926, as amended, is amended to read as follows:

(d) (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (whether created at the time of such transfer or thereafter arising from any source, and whether exercisable in an individual or representative capacity) by the decedent ~~alone~~ *or by any other person* or by the decedent in conjunction with any ~~other~~ person, to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

Rep. No. 3068, 74th Cong., 2d Sess., where at page 11 it is merely noted that the Senate agreed to the conference amendment of the amendment. Hence, the only explanation of the amendment (aside from a meager explanation made of it by Senator Walsh at the time he introduced the amendment as Section 807 of the Revenue Bill of 1936)¹⁵ was made by Section 206 of H. R. 12,793 and is that found in H. Rep. No. 2818, same Congress and Session, at page 9 as follows:

Section 206 amends section 302 (d) (1) of the Revenue Act of 1926, as amended, relating to the inclusion in the gross estate of a decedent of the value of property, transferred by him by trust or otherwise, but subject to a power to alter, amend, or revoke. The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White v. Poor* (296 U. S. 98). Although in that case the decedent had created a trust which was at her death subject to a power to terminate, existing in the decedent as trustee in conjunction with two other trustees, nevertheless the Supreme Court held that section 302 (d) did not require the inclusion, in the gross estate of the dece-

¹⁵ Senator Walsh's explanation is as follows (80 Cong. Record, Part 8, p. 9073) :

MR. WALSH. Mr. President, the purpose of this amendment is to clarify the revocable-trust provisions of the present law, which threaten a large loss of revenue to the Government. It is estimated that this amendment would save the Government as much as \$20,000,000 a year.

MR. TYDINGS. Does the amendment apply ex post facto?

MR. WALSH. No.

MR. TYDINGS. Just from now on?

MR. WALSH. From now on.

dent of the property subject to such power of termination. The Court held that the power to terminate existing in the decedent at the date of her death resulted from the action of the other trustees and not by virtue of any power reserved to herself as settlor in the original estate. The case, therefore, suggests that section 302 (d) may be circumvented in many ways so long as the power to alter, amend, revoke, or terminate does not accrue to the settlor by virtue of the reservation in the trust instrument. It is, therefore, provided that section 302 (d) covers a power whether created at the time of transfer or thereafter arising from any source and whether exercisable in an individual or representative capacity. To some extent, it is believed this amendment is declaratory of existing law.

Accordingly, the Board in the *Keiffer* case, correctly, we think, regarded the amendment as purely declaratory so far as the issue there was concerned, and that means, of course, so far as the issue here is concerned. Cf. Section 81.20 of Treasury Regulations 105, promulgated under Section 811 (d) (1) of the Internal Revenue Code (Appendix, *infra*), which considers the amendment as merely declaratory of the meaning of the subdivision prior to the amendment.

If, however, this is a mistaken view, then nothing could be clearer than that the amendment prospectively applies to the situation here, as well as to situations similar to that in *White v. Poor, supra*.

It is therefore respectfully submitted that the value of the property transferred by the decedent in trust for the benefit of Ralph on December 20, 1938, is also

includible in the decedent's gross estate under Section 811 (c) (1) of the Internal Revenue Code.

CONCLUSION

For the reasons stated, the decision of the Tax Court should be affirmed.

Respectfully submitted,

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JANUARY, 1944.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States

* * * *

(c) *Transfers in contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) *Revocable transfers*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

* * * * *

(26 U. S. C. 1940 ed., Sec. 811.)

Civil Code of California (1937), Deering, c. 2, Art. 5;

§ 2280. *Revocation of trusts.* Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby. (Enacted 1872; Amended by Stats. 1931, p. 1955.)

Treasury Regulations 105 (relating to the estate tax under the Internal Revenue Code):

SEC. 81.16. *Transfers in contemplation of death.*—Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth,

must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possession and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

Any transfer without an adequate and full consideration in money or money's worth, made by the decedent within two years of his death, of a material part of his property in the nature of a final disposition or distribution thereof, is, unless shown to the contrary, deemed to have been made in contemplation of death.

If the executor contends that the value of a transfer of \$5,000 or more made by the decedent subsequent to September 8, 1916, should not be included in the gross estate because he considers that such transfer was not made in contemplation of death, he should file sworn statements with the return, in duplicate, of all the material facts and circumstances, including those directly or indirectly indicating the decedent's motive in making the transfer and his mental and physical condition at that time, and one copy of the death certificate.

The fact that a gift was made as an advancement to be taken into account upon the final distribution of the decedent's estate is not, in and of itself, determinative of its taxability. (See section 81.15.)

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source

from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke," Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

No. 10,506

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE A. KOCH, Executor of the Estate
of Adolph J. Koch, Deceased,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

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FILED

FEB 18 1944

PAUL P. O'BRIEN,
CLERK

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REPLY BRIEF FOR PETITIONER.

I.

AN ANALYSIS OF RESPONDENT'S ARGUMENTS.

Respondent seeks to meet the petitioner's argument that the Court below applied an erroneous interpretation of the statutory term "contemplation of death with the contention that if both a purpose to make a substitute for testamentary disposition and a motive connected only with life are shown to exist then the taxpayer has failed to show that decedent's dominant motive was the one connected with life". (Respondent's Brief p. 15.)

It is submitted that no such doctrine is recognized. *The Land Title & Trust Co. v. McCaughn* (7 Fed. Supp. 742), and the other cases cited by respondent,

do not stand for this proposition. In that case the indenture of trust, executed one year and ten months before the decedent's death at approximately 80 years of age, conveyed "practically all his property" and not merely a substantial portion as here. The motive disclosed was one "to conserve his property for his children, that is to dispose of it in such manner that it could not be dissipated by them after they came into possession of it". As the Court observed (p. 744): "a purpose to conserve the estate against mistakes, errors of judgment, or inexperience of its beneficial owners is not in the least inconsistent with an intention to make its transfer a substitute for testamentary disposition."

But in the instant case the motives disclosed by decedent Koch's statements to his associates (George, Johnston, Compton) were *inconsistent* with the intent to make a substitute for testamentary disposition. Those motives were to make his grandson Ralph "absolutely independent", and to equalize the gift to his grandson with one to his son George.

The Courts uniformly have held that a motive to make one's children and grandchildren, the objects of one's bounty, independent while the transferor is *still alive* is *inconsistent* with the testamentary motive. The Prentice-Hall Tax Service (1943, Vol. 3, par. 23, 221 D), contains the caption of "Transfers held not taxable where motive is to provide independent income for dependents. In the the following decisions the *controlling* factor in deciding the issue in each case was that the transfers in question were

made *primarily* for the purpose of providing independent incomes for dependents of the donor." Forty-three cases are cited there which hold that where the *compelling motive* for the transfers was to provide independent means for decedent's children the transfer was not taxable. Six of those cases were decided in 1943.

If respondent's broad position were correct, not only could these cases not have been decided favorably to the taxpayer, but almost no *inter vivos* gift of a substantial portion of the assets of a transferor of advanced age to his children or grandchildren would be exempt from estate tax where the transferor in making the gifts followed the intention expressed in his will of dividing the property *per stirpes*, an intention which transferors generally follow, for their gifts are usually made in equal portions to those who will also take under their wills. Any explanation which would be given by a transferor of advanced age would be rejected because such a decedent must always "have known that the sands of life were fast running out and that his life expectancy was short and that it was highly desirable his house be put in order". (Tr. p. 41.) There would be no substantial dissimilarity between the "time and manner in which the transfers were made" (Tr. p. 41) in this and in those cases.

The rationale of such a doctrine would be the repudiated one (*U. S. v. Wells*, 283 U.S. 102) of old age with its "premonitions and promptings independent of mortal disease". Though the Court below pro-

tests that such is not the case, it is difficult to read its decision analytically without concluding that the rationale of its decision is old age.

Estate of Charles Delany (1943), 1 T.C. (No. 105), is in point. There a decedent made transfers in 1917, 1923 and 1935 (two years and two months before his death) of "very substantial" amounts of his assets (about 50% or over \$700,000). These gifts were as follows: (1917) a ten thousand dollar insurance policy to his son as trustee for the benefit of his two daughters for life, (1923) to another trustee life insurance policies aggregating \$200,000 and bonds of the face amount of \$195,000 for the benefit of his two daughters, (1935) to trustees, securities valued at \$177,495.24 for the benefit of these daughters, (1935) an absolute gift to his son, to equalize the gifts to the daughters, of securities valued at \$86,126.38. The decedent died in 1937 from coronary thrombosis at the age of 80 years and 7 months. He left an estate of \$763,754.22, exclusive of these gifts.

In hold that the gifts had not been made in contemplation of death, the Court said:

"It is also shown that the decedent was moved to make gifts to the trust for the purpose of providing his daughters with independent incomes, and the gift to his sons was for the purpose of equalizing the gifts among the children. All of these were purposes associated with life rather than death, and in such circumstances, the value of the gifts is not includible in decedent's gross estate (citing cases).

Decedent was approximately 80 years and 7 months of age at the date of his death, and was

past 78 when he made the last two gifts in 1935, but age alone is not the decisive test.

See *Estate of Robert Wetherill*, 36 B.T.A. 1259, in which case the decedent was 83 years of age at death. In *Edward C. Moore, Jr., et al., Executors*, 21 B.T.A. 279, the decedent died at the age of 86 and the gifts were made within two years of death. In *Estate of Katherine H. Talbott*, 42 B.T.A. 1081, the decedent died of coronary occlusion at the age of 71 years. In the two latter cases we held that the gifts were not made in contemplation of death. The facts in the Talbott case are strikingly similar to the case at bar. As the Supreme Court pointed out in *United States v. Wells*, *supra*:

‘Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test for sound health and purposes associated with life, rather than with death, may motivate the transfer.’

We find nothing in the present record to indicate that the contested transfers were gifts *causa mortis* or were intended as substitutes for testamentary dispositions. While the aggregate of the gifts was very substantial in amount, decedent retained a material portion of his property, which he disposed of by will.”

See, also, *Estate of C. A. Proctor v. Hassett*, 1943, D. C. Mass. P.H. Fed. Tax Serv. 1943 par. 62,796; *Security First National Bank of L. A., Margaret B. Smith (Excrs., Est. of John B. Bryan)*, Memo T. C. 4-30-43, Docket No. 106494; *Estate of Charles T. Smith*, Memo T. C. 1-30-43, Docket No. 108998; *Cen-*

tral National Bank of Cleveland v. U. S. (1941), 41 Fed. Supp. 239, 94 Ct. Cl. 527; *C. F. Kroger et al.*, Memo T. C. 8-17-43, Docket No. 201; *Wishard Exec. v. U. S.* (1943), Fed. Tax Service par. 62,703 (decedent was 89 years old when he died. Seven years before he surrendered all interest in favor of his sister and wife in an annuity contract. The transfer was held not taxable as it was for the purpose of providing independent incomes for sister and wife).

The gifts in the *Delaney* case were like Koch's, made to the natural objects of decedent's bounty. The terms of Delany's will which disposed of the material part of the estate retained does not appear from the findings. It is only logical to assume, however, that in making these transfers (Delany equalized the gifts to the daughters with one to the son), Delany, like Koch, followed the same intention expressed in his will of dividing his property *per stirpes*.

When he made these gifts, Koch was thinking of more than just seeing Ralph through Stanford. If that had been all there might be some point in the Court's observation that "Ralph had no immediate need for any large sum of money", that "several years would elapse before he (Ralph) could embark on a business career" and that Koch "as long as he lived was in a position to furnish Ralph with funds required either for his education or for business". Incidentally, Delany's children do not appear to have been in need either of the large sums given them and Delany could also have furnished them with funds

as long as he lived. But Koch had in mind the overall situation of family discord and antagonism between himself and Ralph's father and stepmother. He wanted the boy to have an income which would make him "absolutely independent" of all that. That is what he said and there is no reason to doubt it. Then he wanted to equalize this gift with one to George. This explanation which he (Koch) gave for "advancing the time of enjoyment by Ralph of such a substantial portion of his property" was the same as the Tax Court accepted in the *Delany* case for a similar advancement of the time of enjoyment by that decedent's children of an even more substantial portion of his property.

The *Delany* case presents further parallels. There the Tax Court believed that the decedent also wanted to relieve himself of the responsibility of handling a portion of his extensive holdings and to have his children assume responsibility of management during his lifetime. The fact that three of these gifts were in trust with trustees other than the children themselves (the son was trustee of only one) did not prevent the inference that he wanted the children to share more responsibility. In the instant case, if Koch did not want to "school" Ralph, he may well have wanted George to assume still more responsibility of management over his assets than he had in the past. If the "activities of a normal life had all but ceased" (Tr. p. 41), it is a fair inference that Koch also wanted to relieve himself of the responsibility of handling such a substantial portion of his assets.

Respondent insists that Koch was "tax conscious". This remark is based on the fact that at the suggestion of George he made the gifts in issue in two separate years (1938 and 1939) to minimize gift (not estate) taxes. (Note, a gift tax was paid on the trust for Ralph, though respondent states at page 37 of its brief that none should have been imposed.) But tax consciousness (unless it relates to estate tax) is a motive associated with life. It has been held frequently that transfers motivated by the desire to reduce *gift* or income taxes are not made in contemplation of death. In *Estate of Annie Felton Howell, Josephine F. Howell and C. Howell, Excrs.*, Memo T. C. 1-28-43, Docket No. 108401, the taxpayer to avoid *gift* taxes and to reduce income taxes transferred property in 1932 at the age of 80 years and died in 1937 at 85 years of age. Held, that the transfer was motivated by a desire to save taxes and was not a gift made in contemplation of death.

In *Estate of John B. Waterman*, Memo B.T.A., Docket Nos. 99743, 98450, 12-12-41, the decedent died on April 30, 1937 at 71 years of age. A gift made to his wife on March 8, 1937 (a little more than a month before) was motivated by the desire to minimize federal income taxes. Held, that the gifts were not made in contemplation of death. See (1943) P.H. Federal Tax Service Vol. 3, Par. 23,221(B), and numerous cases cited there to the same effect.

The respondent argues that decedent was suffering from an "incurable disability". There is nothing in the record to show that the injury to his hip was

incurable or that it was such a serious nature as to alarm the decedent about its possible fatal consequences. Koch did not die from this injury, nor did he ever believe that he would. So far as the alleged paralytic stroke of May, 1938 (if it was a stroke, it was a light one from the effects of which Koch completely recovered) is concerned, respondent ignores the fact that if Koch did have such a stroke, he never knew that he had it. The attending physician, Dr. Cottrell (like the physician in *Estate of John Moir*, 47 B.T.A. (No. 104) 1942, P.H. Tax Service, par. 64-977, who did not tell decedent he had suffered cerebral hemorrhage) did not inform Koch of this, nor did anyone else. Cottrell told him instead that he would be all right in a few days. Koch himself always thought he had just twisted his hip and fallen. The fact is of great importance, for it negatives any idea of a "particular concern, giving rise to a definite motive". His statement a few months later to his son-in-law, "Don't worry about me croaking. I'll live longer than you do", and his general attitude indicated clearly that he was not worried about either the fall or the injury.

There is necessarily no dispute with the right of the trier of the fact to find from all the evidence whether the dominant motive of the transfers was to make a substitute for a testamentary disposition. But there was no direct evidence here that Koch's motive was testamentary and the Court was bound by the uncontradicted, positive testimony as to decedent's motive, since it was not improbable or unreasonable and was supported by the background of

family discord and all the other circumstances. 32 C. J. 1089. Not only were the decedent's statements to his associates the "best evidence of the decedent's state of mind and the reasons activating him in making the transfers" (*Wells v. U. S.*, supra, at page 1041), but they were the only direct evidence in the record. More disbelief of testimony is not affirmative proof of facts of an opposite nature. The Court could not arbitrarily reject this proof of intent and draw contradictory inferences as it did. 32 C. J. 1089.

It is thus not a question of asking this Appellate Court to try the case *de novo* but to hold that there was no substantial evidence to support the findings and decision of the Tax Court and that in deciding this case it applied an erroneous interpretation of the statutory term "contemplation of death".

CONCLUSION.

For the reasons stated, the decision of the Tax Court should be reversed.

Dated, San Jose, California,

February 16, 1944.

Respectfully submitted,

GERALD S. CHARGIN,

Attorney for Petitioner.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the
United States for the Northern District
of California, Southern Division.

FILED

FEB 29 1944

PAUL R. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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United States for the Northern District
of California, Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Mr. WALTER H. DUANE,
490 Mills Building,
San Francisco, California,
Attorney for Defendant and Appellant.

Mr. FRANK J. HENNESSY,
United States Attorney,
Northern District of California,

Mr. JAMES T. DAVIS,
Assistant United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,
Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States
District Court for the Northern District of
California

(No. 27868 G—INDICTMENT)

FIRST COUNT: Jones-Miller Act, Title 21 USC
174;

In the November 1942 term of said Division of
said District Court, the Grand Jurors thereof on
their oaths present: That Chan Chaun (whose full
and true name is other than hereinabove stated
to said Grand Jurors unknown, hereinafter called
“said defendant”), on or about the 1st day of
December, 1942, in the City and County of San
Francisco, State of California, within said Division
and District, fraudulently and knowingly did con-
ceal, and facilitate the concealment of a lot of
smoking opium, in quantity particularly described
as 12 5-tael tins containing approximately 80 ounces
of smoking opium, and the said smoking opium had
been imported into the United States of America
contrary to law as said defendant then and there
knew.

SECOND COUNT: Jones-Miller Act, Title 21 USC
174;

And the said Grand Jurors upon their oaths
aforesaid do further present:

That at the time and place mentioned in the first
count of this indictment, within said Division and
District, said defendant fraudulently and knowingly

did facilitate the transportation of said lot of smoking opium in quantity particularly described as 12 5-tael tins containing approximately 80 ounces of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendant then and there knew. [*1]

THIRD COUNT: Jones-Miller Act, Title 21 USC 174;

And the said Grand Jurors, upon their oaths aforesaid do further present:

That on or about the 9th day of December, 1942, in the City and County of San Francisco, State of California, within said Division and District, said defendant fraudulently and knowingly did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 3 jars containing approximately one ounce and 184 grains of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendant then and there knew.

FOURTH COUNT: Jones-Miller Act, Title 21 USC 174;

And the said Grand Jurors upon their oaths aforesaid do further present:

That at the time and place mentioned in the third count of this indictment, within said Division and

*Page numbering appearing at foot of page of original certified Transcript of Record.

District, said defendant did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of opium, to-wit, a lot of Yen Shee, in quantity particularly described as 220 grains of Yen Shee, and the said Yen Shee had been imported into the United States of America contrary to law as said defendant then and there knew.

FRANK J. HENNESSY

United States Attorney

Approved as to Form.

R. B. McM.

[Endorsed]: A true bill, Emil E. Engels, Foreman. Presented in open court and ordered filed Feb. 3, 1943. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 26th day of February, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause—No. 27868.]

DEFENDANT'S PLEA OF NOT GUILTY TO
THIRD AND FOURTH COUNTS OF IN-
DICTMENT

This case came on regularly this day for entry of the plea of the defendant Chan Chaun. The defendant was present with his Attorney Walter H. Duane, Esq. Joseph Karesh, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called to plead and thereupon the defendant waived the reading of the Indictment and entered a plea of "Not Guilty" to the Third and Fourth Counts of the Indictment, which said plea was ordered entered. After hearing the Attorneys, it is ordered that this case be continued to March 5, 1943, to be set for trial. [3]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday the 14th day of April, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDER CONSOLIDATING THIS CASE AND
CASE No. 8362, PENDING IN THE NORTH-
ERN DIVISION OF THIS COURT, FOR
TRIAL

This case came on this day to be set for trial. James T. Davis, Esq., Assistant United States Attorney, was present for and on behalf of the United States. The defendant, Chan Chaun, was present with Walter H. Duane, Esq., his Attorney.

Upon motion of Mr. Davis, and by consent of Mr. Duane, it is ordered that case No. 8362, United States of America, vs. Chan Chaun, pending in the Northern Division of this Court, be and the same is hereby consolidated with this case for trial.

After further hearing the Attorneys, it is ordered that this case and said consolidated case No. 8362 be and the same is hereby set for May 27, 1943, for trial. [4]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 27th day of May, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause—No. 27868-G.]

ORDER RESETTING TRIAL OF
CONSOLIDATED CASES

Upon motion of Walter H. Duane, Esq., Attorney for defendant, and by consent of James T. Davis, Esq., Assistant United States Attorney, it is ordered that this case and case No. 8362, United States of America vs. Chan Chaun, heretofore consolidated with this case for trial, be and the same are hereby reset for June 8, 1943, for trial, and that said cases follow the trial of case No. 22359, United States of America vs. 1.057 Acres of Land, Eden Township, et al. [5]

[Title of District Court and Cause.—No. 27868-G.]

VERDICT

We, the Jury, find Chan Chaun, the defendant at the bar, guilty on Third County, guilty on Fourth Count.

W. F. SISSON,
Foreman.

[Endorsed]: Filed August 5, 1943 at 4 o'clock and 25 minutes P. M. C. W. Calbreath, Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 5th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

No. 27868-G (San Francisco)

UNITED STATES OF AMERICA,

vs.

CHAN CHAUN.

No. 8362 (Sacramento)

UNITED STATES OF AMERICA,

vs.

CHAN CHAUN.

ORDER DENYING MOTION FOR NEW TRIAL
AND MOTION IN ARREST OF JUDGMENT

The defendant, the attorneys, and the jury heretofore impaneled herein being present as heretofore, the further trial of the two (2) above entitled cases was thereupon resumed. C. T. Cass and Joseph A. Manning were recalled and further testified on behalf of the United States. Robert L. Park was sworn as a Chinese Interpreter. Pon Yin Jeung

was sworn and testified on behalf of the United States. Mr. Davis made a motion for a continuance of the trial of these cases on the ground that the United States desired to call an additional witness, and after hearing had, it is ordered that said motion be denied, without prejudice to the right to renew said motion. The United States rested. Mr. Duane made a motion for a directed verdict in favor of the defendant in each case, [7] which said motion was ordered denied. Pon Yin Leong and Pon Wai were recalled and testified on behalf of the defendant. Lee King and Chan Chaun were sworn and testified on behalf of the defendant. Mr. Duane introduced in evidence Defendant's Exhibit "A". Defendant rested. Mr. Davis renewed the motion for a continuance of the trial of the cases on the grounds heretofore stated, and after hearing had, it is ordered that said motion be and the same is hereby denied. Thereupon the evidence was closed. After argument by the Attorneys and the instructions of the Court to the jury, the jury at 3:50 o'clock P. M. retired to deliberate upon their verdicts. At 4:25 o'clock P. M., the jury returned into Court and being asked if they had agreed upon their verdicts, replied in the affirmative and returned the following verdicts, which were ordered recorded, viz: "The United States of America, vs. Chan Chaun, No. 8362, We, the Jury, find Chan Chaun, the defendant at the bar, Guilty. W. F. Sisson, Foreman", and "The United States of America, vs. Chan Chaun, No. 27868-G, We, the Jury, find Chan Chaun, the defendant at the bar, Guilty on

Third Count, Guilty on Fourth Count. W. F. Sisson, Foreman” Ordered that the jury be discharged from the further consideration of these cases and that all jurors in attendance this day be excused until notified to report. Mr. Duane made a motion for a new trial, which said motion was ordered denied. Mr. Duane made a motion in arrest of judgment, which said motion was ordered denied. Mr. Duane gave oral notice of appeal. After further hearing the attorneys, it is ordered that these two cases be continued to August 7, 1943, for judgment. Further ordered that the defendant be remanded into the custody of the United States Marshal and that a Mittimus issue herein. [8]

[Title of District Court and Cause—No. 27868-G.]

MOTION OF DEFENDANT IN
ARREST OF JUDGMENT

Comes Now Chan Chaun, defendant in the above entitled action, against whom a verdict of guilty was rendered on the 5th day of August, 1943, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant on each and every count of said indictment.

1. That the indictment and each and every count thereof in this cause, does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That said indictment and each and every count thereof is uncertain, unintelligible and ambiguous and insufficient in law to apprise said defendant of the nature of the charge or charges against him;

3. That the evidence is not sufficient to support the verdict as to any of the counts of said indictment;

4. That the verdict on each and every count of said indictment is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court, and said defendant prays that this motion be sustained and the judgment of conviction against defendant be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed Aug. 7, 1943. [9]

[Title of District Court and Cause—No. 27868-G.]

MOTION FOR A NEW TRIAL

Now Comes the defendant Chan Chaun in the above entitled action, and moves this Honorable Court for an order vacating the verdict of the jury convicting said defendant, and granting said defendant a new trial on each and every count of the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That said verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by said defendant;

6. That the trial court erred in refusing to give certain instructions proposed by said defendant, and to which ruling of the court said defendant duly and regularly excepted;

7. That the trial court erred in refusing to direct a verdict of "not guilty" at the close of the evidence of the United States;

8. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid;

To all of which motions said defendant duly and regularly excepted. [10]

This motion is made upon the minutes of the Court and upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial.

Dated: August, 1943.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed Aug. 7, 1943. [11]

District Court of the United States, Northern
District of California, Southern Division

No. 27868-G Criminal Indictment in Four counts
for violation of U.S.C., Title 21 Sec. 174; Jones-
Miller Act.

UNITED STATES

v.

CHAN CHAUN

JUDGMENT AND COMMITMENT

On this 7th day of August, 1943, came the United States Attorney, and the defendant, Chan Chaun, appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offenses charged in the 3rd & 4th Cts., of the Ind. in the above-entitled cause, to-wit: Viol. of Jones-Miller Act, Title 21 USC 174—Third Count—Jones-Miller Act, Title 21 USC 174—defendant on December 9, 1942, in San Francisco, California, did conceal and facilitate the concealment of a lot of smoking opium in quantity particularly described as 3 jars containing approximately one ounce and 184 grains of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law as said defendant knew; Fourth Count—Jones-Miller Act, Title 21 USC Sec. 174—defendant, on December 9, 1942, in San Francisco, California, did conceal and facilitate the concealment of a certain

quantity of a derivative and preparation of opium, to-wit, a lot of Yen Shee, in quantity particularly described as 220 grains of Yen Shee, and the said Yen Shee had been imported into the United States of America contrary to law as said defendant knew; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court [12]

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of One (1) Year and One (1) Day and pay a fine to the United States of America in the sum of One Hundred and No/100 (\$100.00) Dollars on the Third Count of the Ind. and for the period of One (1) Year and One (1) Day and pay a fine to the United States of America in the sum of One Hundred and No/100 (\$100.00) Dollars on the Fourth Count of the Ind.; and it is further ordered that the periods of imprisonment imposed on defendant on the 3rd & 4th Counts of the Ind. commence and run concurrently and commence and run concurrently with the period of imprisonment imposed on defendant in Case No. 8362 (Sacramento) United States of America vs. Chan Chaun; and that said defendant be further imprisoned until payment of said fines, or until said defendant is otherwise discharged as provided by law.

It Is Further Ordered that the First and Second Counts of the Ind. be and the same are hereby dismissed.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

LOUIS E. GOODMAN

United States District Judge.

The Court recommends commitment to a U. S. Penitentiary.

Entered and Filed this 7th day of August, 1943.

C. W. CALBREATH

Clerk.

(By) J. A. SCHAERTZER

Deputy Clerk.

Examined by: James T. Davis, Asst. U. S. Atty.

Entered in Vol. 35 Judg. and Decrees at Pages 319-320. [13]

[Title of District Court and Cause—No. 27868-G.]

NOTICE OF APPEAL

Name and Address of Appellant: Chan Chaun,
717 Grant Avenue, San Francisco, California.

Name and Address of Appellant's Attorney: Walter H. Duane, Esq., 490 Mills Building, San Francisco, California.

Offense: Violation of Jones-Miller Act, Title 21 U.S.C.A. Section 174.

Third Count: That the defendant on or about the 9th day of December, 1942, in the City and County of San Francisco, State of California, within said Division and District, did fraudulently and knowingly conceal and facilitate the concealment of a lot of Smoking Opium in quantity particularly described as 3 jars containing approximately one ounce and 184 grains of Smoking Opium, and the said Smoking Opium had been imported into the United States of America, contrary to law, as said defendant then and there knew.

Fourth Count: That the defendant, on or about the 9th day of December, 1942, in the City and County of San Francisco, State of California, within said Division and District, did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of Opium, to-wit, a lot of Yen Shee, in quantity particularly described as 220 grains of Yen Shee, and the said Yen Shee had been imported into the United States of America, contrary to law, as said defendant then and there knew.

Date of Judgment: August 7, 1943.

Description of Judgment and Sentence: "Guilty" upon Counts Three and Four of said Indictment, as above set forth; one (1) year and (1) day imprisonment upon the Third Count of said Indictment and One (1) year and One (1) Day [14] imprisonment upon the Fourth Count of said Indict-

ment and a fine of \$100.00 on the Fourth Count of said Indictment; the sentence of imprisonment upon the Third Count and the sentence of imprisonment upon the Fourth Count to run concurrently and the said sentences of imprisonment so running concurrently to run concurrently with the sentence of imprisonment imposed upon said defendant in the action numbered 8362, which said action was consolidated with the above entitled action for the purposes of trial.

Name of Prison Where Now Confined: County Jail of the City and County of San Francisco, under five (5) days stay of execution.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above mentioned, on the grounds set forth below:

Grounds of Appeal

1.

That the learned trial Judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

2.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

3.

That the learned trial Judge erred in denying the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that taking said evidence in said [15] case is not sufficient as a matter of law to support a verdict of "Guilty".

4.

That the trial court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

Dated: August 9, 1943.

CHAN CHAUN

Appellant

WALTER H. DUANE

Attorney for Appellant

[Endorsed]: Filed Aug. 10, 1943. [16]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 18th day of August, in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause—No. 27868-G.]

COURT'S INSTRUCTIONS RE
RECORD ON APPEAL

This case came on this day for hearing the instructions regarding the preparation of the record on appeal. Walter H. Duane, Esq., and James B. O'Connor, Esq., were present as attorneys for the defendant. Thomas C. Lynch, Esq., Assistant United States Attorney, was present for and on behalf of the United States. After hearing Mr. O'Connor and Mr. Lynch, it is ordered that the defendant lodge and file the proposed bill of exceptions and assignment of errors within thirty (30) days, that the United States lodge and file its proposed amendments and objections to said proposed bill of exceptions within fifteen (15) days, and that the bill of exceptions be settled and filed within fifteen (15) days thereafter. [17]

At a Stated Term, to wit: The October Term 1943, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the twenty-sixth day of November, in the year of our Lord one thousand nine hundred and forty-three.
Present:

Honorable Curtis D. Wilbur, Senior Circuit
Judge, Presiding,

Honorable Francis A. Garrecht, Circuit Judge,
Honorable Clifton Mathews, Circuit Judge,

No. 27868—No. 10525

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO SETTLE
AND FILE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. James B. O'Connor, counsel for appellant, and of the stipulation of Mr. Frank J. Hennessy, United States Attorney, counsel for appellee, and good cause therefor appearing,

It Is Ordered that the time within which the bill of exceptions of appellant herein may be settled and filed be, and hereby is extended to and including the 10th day of December, 1943.

[Endorsed]: Filed Nov. 26, 1943. [18]

[Title of District Court and Cause—No. 27868-G—
8362 (Sac.).]

BILL OF EXCEPTIONS OF DEFENDANT
CHAN CHAUN

Be it remembered that heretofore and during the November 1942 term of said Southern Division of

the United States District Court in and for the Northern District of California, the Grand Jury of said Division and District did present and return in and before the above entitled Court its indictment against the above named defendant; that thereafter said indictment was filed in said Court and thereupon said defendant was duly arraigned, as shown by the record on file in the above entitled Court; and

Be it further remembered that heretofore and during the October 1942 term of the Northern Division of the United States District Court in and for the Northern District of California the Grand Jury of said Division and District did present and return in and before the Court of said Division and District its indictment against the above named defendant; that said indictment was filed in said Court and thereafter said defendant was duly arraigned, as shown by the record on [20] file in the above entitled Court;

That heretofore and on April 14, 1943 indictment No. 8362 (Sac.) returned in the Northern Division of the Northern District of said Court was ordered consolidated with indictment No. 27868-G returned in the Southern Division of the Northern District of said Court for trial; and

Be it further remembered that prior to trial said defendant entered a plea of not guilty to each of said indictments and on August 4, 1943 the above entitled actions proceeded to trial before the Honorable Louis E. Goodman, United States District

Judge, before a jury, the United States being represented by the Honorable Frank J. Hennessy, United States Attorney in and for the Northern District of California, and James T. Davis, Esq., Assistant United States Attorney, and the defendant being represented by Walter H. Duane, Esq.; said causes having been called for trial the Court directed the filling of the jury box with proposed jurors. Thereafter the Court stated the nature of the case and questioned the jurors as to their qualifications, at the conclusion of which the jury was impaneled to try the above entitled causes.

Thereupon the United States, to maintain the issues on its part to be maintained, called as its first witness R. F. Love.

TESTIMONY OF R. F. LOVE FOR THE UNITED STATES

R. F. Love, produced as a witness on behalf of the [21] United States, having been first duly sworn, testified substantially as follows:

My name is R. F. Love and I am by occupation a chemist employed by the United States Bureau of Internal Revenue and have been so employed for the last twenty-five years. (The qualifications of the witness as an expert were here stipulated to.)

I have examined the contents of these jars that you show me. Four of the jars which you show me contain smoking opium. I examined these particu-

(Testimony of R. F. Love.)

lar jars and put my initials upon them. There are two jars together being one exhibit and there is contained in these two jars approximately one ounce and 174 grains of smoking opium. These jars were delivered to me by Agent Cass.

Whereupon two jars identified by the witness were marked "U. S. Exhibit 1 For Identification".

The jars that have just been marked U. E. Exhibit No. 1 For Identification contained one ounce, 174 grains of smoking opium. They have been continually in my custody from the day I received them from Agent Cass until I produced them in Court today.

Thereupon a jar was offered for identification and marked "U. S. Exhibit 2 for Identification".

The Government's Exhibit 2 For Identification, which you show me contains ten grains of smoking opium. I received this jar from Agent Cass and it has been in my possession since then [22] until now.

Thereupon a jar was offered and received as "U. S. Exhibit 3 For Identification".

U. S. Exhibit 3 For Identification, which you show me, has been examined by me and contains 121 grains of Yen Shee.

Thereupon a package was marked "U. S. Exhibit 4 For Identification".

U. S. Exhibit 4 For Identification, which you show me, has been examined by me. It contains 66 grains of yen shee. I received this package from

(Testimony of R. F. Love.)

Agent Cass and it has been in my custody since that time.

Thereupon a package was offered and received as "U. S. Exhibit 5 For Identification".

The package U. S. Exhibit 5 For Identification, which you show me, has been examined by me and it contains 33 grains of yen shee. This package was received by me from Agent Cass and has been in my custody since then until today.

Thereupon 12 brass tins contained in a cardboard carton were offered and received as "U. S. Exhibit 6 For Identification".

U. S. Exhibit 6 For Identification, which you show me, has been examined by me. This exhibit contains smoking opium in the quantity of approximately 5 taels. A tael is about $6\frac{2}{3}$ ounces. I examined the contents of the Government's Exhibit 6 For Identification and found they contained smoking opium. Each of said tins contain smoking opium. Yen shee is the ash which is left after opium has been smoked. The 12 tins [23] which form U. S. Exhibit 6 For Identification were received by me from Agent Cass and have been in my possession since then until today.

Cross Examination

I received Government's Exhibits 1 and 2 For Identification on or about December 4, 1942.

TESTIMONY OF DWYER H. SKEMP FOR THE
UNITED STATES

Dwyer H. Skemp, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

My name is Dwyer H. Skemp and I am by occupation an agriculture inspector with the State Department of Agriculture and was so engaged in said occupation on December 1st of last year and have been so engaged in that occupation since 1930. As such Inspector it is part of my duties to inspect the cars, baggage, luggage, trunks and their manifests entering the State of California in the enforcement of the California Agriculture Laws in conjunction with various other agencies.

On the first day of December of last year I had occasion to inspect the baggage on a Pacific Greyhound bus coming through from Portland. I was working on the night shift and I was inspecting all baggage that came in on that night from midnight until 8:00 A. M. The black suitcase which you show me I saw in the baggage section of the stage, in the early morning of December 1st when I was checking the suitcases that came in on [24] that bus. The bus was a Greyhound stage, the driver of which was a Mr. Cross. When I inspected this black suitcase the bag contained, besides an Oregon paper and a Chinese paper, some olive drab tins wrapped in a newspaper, and they had an emblem on them. I believe it was a K and there was some lettering on the side. As I recall there were 12 tins in the bag.

(Testimony of Dwyer H. Skemp.)

The 12 tins which you show me appear to be identical with the tins I saw in the suitcase which was taken from the stage. The baggage check attached to the bag which you show me was examined by me at Hornbrook. I recognize the number on the baggage check. I made a notation of it at the time. The number is 9-37-21. I recall that number of my own knowledge. Whereupon a black suitcase and its contents and a baggage check attached thereto were offered and received as "U. S. Exhibit 7 For Identification".

Cross Examination

I identify the bag and baggage check and its contents by the Life magazine and the newspaper therein and the paper with the Chinese writing that is in it. I identify the bag as the make of bag, and baggage check on it, and all of the contents. I identify them as identical with the items in the suitcase I inspected. The Life magazine which you show me, dated October 5th, is the same magazine which was in the suitcase and I identify it by the picture on the front of it. I could not say definitely, but I believe I have seen other [25] copies of Life dated October 5, 1942. I do not know whether I saw any other copy of Life of October 5, 1942 with the same picture on the cover. I only recognize the magazine. [26] All I know is that a magazine similar to the one shown me now was in the suitcase that I inspected at Hornbrook. There is no question whatever in my mind but that the Oregon Journal dated

(Testimony of Dwyer H. Skemp.)

November 8, 1942 is the same newspaper that I saw in the suitcase. I can tell that it is the same newspaper by the appearance and setup on it. I know that there are thousands of copies of the Oregon Journal published, but I say that this newspaper is the one I saw in the suitcase. I can tell by the red flare and the setup. I doubt that you would find any copy of the Oregon Journal in many months that has this particular setup. I can tell this by the appearance and by the number of the check. The baggage check number was 3-47-21. I first said that the baggage check number was 9-37-21. The situation with regard to the grip is this: certain circumstances and appearances cause you to have a recollection in your mind and you might not have a particular detail in your mind unless you wrote it down but the grip and the sequence in packing is always a factor and to that extent the grip and the newspapers appear to be the same as they were at the time I made the inspection. I do not know whether someone else might have put another newspaper in the suitcase, I did not go into it on a close enough inspection. There were probably 38 or 40 passengers to see to and I did not pay that much attention.

TESTIMONY OF C. T. CASS FOR THE UNITED STATES

C. T. Cass, produced as a witness on behalf of the [27] United States, having been first duly sworn, testified substantially as follows:

My name is C. T. Cass. I am an agent of the Federal Bureau of Narcotics and have been such an agent for the past 17 years. The bag which you show me I saw about 2:30 in the afternoon of December 1st at Davis Junction in Yolo County, California. This bag was turned over to me by the driver of bus No. 401 of the Pacific Greyhound. When the bus appeared the driver stepped out of it and said to me, "I guess this is what you are looking for", and he opened the baggage compartment and took out this bag with baggage check 9-37-21 on it. We opened it and removed from it 12 brass, 5 tael tins, having a stamp K on them. The tag that you show me was attached on the 12 brass, five-tael tins by me at the time I examined them at Davis and put them in the vault. The tag was put on in my presence and reads, "Cal. 3192, Chan Chaun & Pon Yin Jun, Exhibit B, 1 black Gladstone bag seized 12-1-42, E. P. Burton and C. T. Cass". I opened and examined the bag at Davis Junction. On an examination of the bag now I state that these are the same newspapers that were in there at the time I examined it at Davis. The only ones that were taken out were some we took out with the 12 cans which were taken out of the suitcase. At the time I examined the suitcase it contained a copy of Life, a

(Testimony of C. T. Cass.)

copy of Look, some Oregon papers and Chinese newspapers. At that time there was also in the bag 12 brass, five-tael cans, containing a black substance. Government's Exhibit 6, which [28] you show me, are the cans we took out of the suitcase and turned over to the chemist. They were wrapped in newspapers. These blue marks on the cans were marks that were placed there by me when we took them to the chemist. When I brought the cans from Davis they were not in the suitcase. The cans were removed from the suitcase at Davis and the suitcase was left on the bus with the baggage and came through in the regular way to San Francisco, while we followed the bus in. The tag which you show me contains my initials and the date 12-4-42. Government's Exhibit 6 For Identification was turned over by me to the chemist. Government's Exhibit 7 For Identification, the red-colored baggage check, was attached to the bag at the time I examined it and at the time I put it in the safe.

After we arrived at the Greyhound Bus Depot around 7:50 on Friday evening we watched the Greyhound Depot for approximately a week. We had taken the opium out and had put the bag back with the check on it on the bus and then followed the bus into San Francisco. The bag was taken off the bus at 7:50 that evening at the Greyhound Bus Depot at Fifth and Mission Streets. A baggage-man put it in the baggage room. The baggage however was there and I walked with him when he went in

(Testimony of C. T. Cass.)

and put it in the baggage room. We watched the bag for approximately five or six days. I watched it part of the time in conjunction with Agent Burton.

On the morning of December 9th when I came down to the office Agent McGuire had the truck driver named Timothy [29] Leong sitting in a room at the office. I later got on the truck with Mr. Leong and the suitcase and about 25 or 50 feet away from [30] 717 Grant Avenue I got off the truck and stood in front of the place. Mr. Leong got off the truck and took the suitcase and walked into the place, placing the suitcase on the floor and walked out. The first time I saw the defendant was approximately half an hour, or thirty minutes later, on the fourth floor of 717 Grant Avenue. At the time I saw the defendant, Mr. Pon Wai the Assistant Manager of 717 Grant Avenue was present. At a conversation between the defendant, Mr. Pon Wai and myself, Mr. Pon Wei made the statement, pointing to the defendant Chan Chaun: "that is the man that gave me check 9-37-21".

Whereupon the Witness Cass was temporarily withdrawn from the witness stand and his cross examination reserved by Mr. Duane until his testimony was completed.

TESTIMONY OF TIMOTHY LEONG FOR THE
UNITED STATES

Timothy Leong, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Timothy Leong. I am by occupation a teamster, employed by the Canton Express.

Thereupon a baggage check marked "U. S. Exhibit 8 For Identification", the baggage check that you show me, I believe is the same check that I used to pick up the suitcase on the Ninth of December of last year. I picked up a suitcase from the Pacific Greyhound bus depot. At that time I presented a claim check and a black suitcase, which I only saw once, was [31] given me. I do not know whether it is similar to the bag you show me or not. I saw it only the one time when I made a delivery from the Federal office. I did not pick it up from the Greyhound depot. I picked it up in the Federal Building from the narcotic agents, who released it to me. I went to the Greyhound station but they did not release any bag or suitcase to me. I presented a check there. I would not know whether the check you show me was the one that was presented. When I presented this check at the Pacific Greyhound depot they made it look as though they were looking for something. They went away and then they came back and said they could not find it and later on two agents came in and called me behind the counter, searched me and asked me what was in the bag. I did not know. All I knew was that I got the check, that I had picked it up and

(Testimony of Timothy Leong.)

took it to a certain place. Then they proceeded to take me to the Federal Building and up there they questioned me again and then decided to give me the suitcase and to make the delivery. That is the first time I saw the suitcase. One of the agents got on the truck with me but got off about 30 feet from the store and I made the delivery and came out of the store. The baggage check that I presented to the Pacific Greyhound bus people was one that I had received from my boss. The check which you show me marked "Canton Express Company" is the check that I received. It was tied with wire to this tag when I came back to the office. The note attached to it says: "H. W. T. & Co." That means Hing [32] Wah Tai & Company. Hing Wah Tai & Company was the place where I delivered the suitcase.

Thereupon the check marked "Canton Express Company" was offered and received as "U. S. Exhibit 9 For Identification".

After I had gone to the Federal Office Building they decided to give me the suitcase to make the delivery. I delivered it to the Hing Wah Tai & Company at 717 Grant Avenue. I did not deliver it to anyone personally. I just said it was the suitcase and laid it on the floor.

Cross Examination

When I took the suitcase to the Hing Wah Tai Company there were several parties there. I just walked in and said, "There is a suitcase for you", and walked out. I have on prior occasions deliv-

(Testimony of Timothy Leong.)

ered merchandise to the ground floor of the establishment where I delivered this suitcase. It is a large floor and there is merchandise there. The writing on Government's Exhibit No. 9 For Identification "H. W. Tai", which you show me, is in the handwriting of my boss. I did not get the suitcase at the Pacific Greyhound bus depot. I testified before the United States Commissioner in this building on the 13th day of January of this year. I have examined the copy of the testimony as taken before the United States Commissioner which you have shown me. I so testified as set forth in that transcript as follows:

"Mr. Duane: Timothy Leong, called for the United States; sworn.

"Mr. Davis: Q. Mr. Leong, you are a driver [33] for the Canton Express Company, is that right? A. Yes.

"Q. Did you have occasion on or about December 9 to call for a certain grip at the Greyhound bus depot? A. Yes.

"Q. Did you have a check to present to the agent up there to pick up a grip?

"A. Yes.

"Q. Where did you get that check?

"A. I got it from the office of the Canton Express. The note was to pick that up.

"Mr. Davis: That is all."

When I went over to the Greyhound bus depot and presented the check, there appeared to be some

(Testimony of Timothy Leong.)

effort to find the suitcase, but it was not given to me there. The Federal narcotic agents came there and took me over to the Federal Building. First they searched me behind the counter at the bus depot and then took me to their office in the Federal Building. They later gave me the suitcase in their office. I did not open it at all and I do not know what was in it; they just handed it over to me and I picked it up right away and put it in the truck. All I know is that it was a black suitcase. I think there was a red tag on it but I do not recall the number on the tag.

TESTIMONY OF FRANK DUN FOR THE UNITED STATES

Frank W. Dun, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Frank W. Dun and I am the owner of the Canton Express Company. Timothy Leong, who testified here this morning, is an employee of the Canton Express Company. On the 9th day of December of last year I directed Mr. Leong to pick up a [34] piece of baggage at the Greyhound bus depot and the tag that you show me, marked Government's Exhibit 9 For Identification, is the tag that I gave to Mr. Leong and I wrote on there the words: "H. W. Tai". I know of my own knowledge that the address 717 Grant Avenue is the address of the Hing Wah Tai Company. At the time

(Testimony of Frank W. Dun.)

I instructed Mr. Leong to pick up the baggage I gave him the baggage check. I do not remember the number of the check, but I did give him a check. It was a Greyhound bus check. I do not remember the color but I do know it was a Greyhound tag. I received the tag which I gave to Mr. Leong from Pon Wai, who is one of the partners of Hing Wah Tai. I gave this check to Leong on the afternoon of the 8th, with instructions to go down and bring the baggage back to the store.

TESTIMONY OF PON WAI FOR THE UNITED STATES

Pon Wai, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Pon Wai and I am shipper and receiver for the Hing Wah Tai Company. I am employed by Mr. Chaun. That company is in the importing and exporting business. On the 9th day of December of last year I delivered to Mr. Frank Dun, the manager of the Canton Express Company, a Greyhound check. I gave him the check to pick up the baggage. The check that I gave him was a red check. I do not know its number. I directed Mr. Dun to pick up the piece of baggage and bring it to the Hing Wah Tai [35] Company. The baggage that was brought to the Hing Wai Tai Company was a black suitcase.

(Testimony of Pon Wai.)

The baggage check that I have referred to was on my desk and Mr. Chaun said: "Take it down to the express company and pick up that baggage". When I say Mr. Chaun, I mean the defendant here.

Cross Examination

I am one of the owners of the Hing Wah Tai Company. I am not exactly an employee. There are six or seven owners in the company and Chan Chaun is one of the owners. Besides the owners there are one or two other employees. I remember testifying before the United States Commissioner on the 13th of January of this year. I remember testifying before the Commissioner as you indicate in the transcript of that testimony as follows:

"Q. Do you know how it got on the desk? Did Chan Chaun put it on the desk or did somebody else put it on the desk?

A. I don't know who put it on the desk.

Q. You did not see Chan Chaun put it on the desk, did you? A. No."

Redirect Examination

It was Chan Chaun who told me to take the check and pick up the baggage but I do not know whether Chan Chaun put it on my desk. He did instruct me to go down and pick it up.

Recross Examination

At the time that Chan Chaun told me to have the baggage picked up there were some strangers standing right there. [36] I don't know who they were.

TESTIMONY OF LEONARD G. TITUS
FOR THE UNITED STATES

Leonard G. Titus, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Leonard G. Titus and I am an employee of the Pacific Greyhound bus line in charge of the baggage department and was so employed on December 9th of last year. On that date I saw Mr. Leong in the baggage department of the Greyhound Bus Company and he, at that time, presented the claim check for a piece of baggage. According to my records, Government's Exhibit No. 8 For Identification, which you show me, is the check which was presented to me. I made a notation in the record book that is kept at the office. I cannot say definitely whether or not I have seen the black bag that you now show me. The check which you show me and which is attached to the bag is a Greyhound bus check. I have been in charge of the baggage department since November 1, 1941. It is our practice to give a package to whatever passenger holds the matching check. By that I mean, when the baggage is checked originally a check is attached to the baggage and whoever presents the other half of that check is given the baggage. Each of these checks contains an identical number. The check that you show me and the check on the bag indicate that the bag was checked at Portland on November 20, 1942 at the Union Terminal. [37]

(Testimony of Leonard G. Titus.)

Cross Examination

When baggage is checked it is taken to the baggage room, at which time the person receiving it takes the ticket, breaks it in half and gives one-half to the passenger and attaches the other half to the baggage. The numbers on each piece correspond. The baggage then goes through to its destination and is put in the baggage room until it is called for by the passenger. In the ordinary course of business I do not pay any attention to the description of the baggage. I look for the identifying ticket.

You cannot check baggage on the Pacific Greyhound line without being a passenger. You must present a ticket of the Greyhound line at the time of checking the baggage. A person could actually present a passenger ticket and check baggage without actually being on the bus, but he would have to have a passenger ticket in order to have his baggage checked.

TESTIMONY OF THOMAS C. McGUIRE FOR THE UNITED STATES

Thomas C. McGuire, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is Thomas C. McGuire and I am now and have been for the last fifteen years a Federal narcotic agent. On the 9th day of December of last year at about 9:30 in the morning, in company with

(Testimony of Thomas C. McGuire.)

District Supervisor Manning, I was in the Greyhound bus depot at Fifth and Mission Street. At that particular [38] place the claim check was recovered from the Chinese delivery boy and he was taken to the Bureau of Narcotics office at the Empire Hotel and after questioning he was given a black bag. The Chinese delivery boy left in the company of another agent. He was followed by myself and another and a number of us went to the vicinity of 717 Grant Avenue in Chinatown. After arriving at that address the Chinese delivery boy was observed to enter and leave the black valise inside the premises, after which I and the other agents entered the premises. After my entry I remained downstairs, while my superior, Mr. Manning and Mr. Manion, the Inspector of the Police Department, and Mr. Cass went upstairs. While I remained downstairs I refused exit to a number of Chinese customers who were in the premises. There was quite a scene taking place outside the store and a number of occupants downstairs began to talk and finally Pon Wai came to me and asked if he could speak to my superior, or Inspector Manion, and I asked him what he wanted to speak about and after he told me I asked Inspector Manion to come downstairs and after talking to him for a few minutes we went up to the fourth floor, at least to the top floor of the building. There District Supervisor Manning and Inspector Manion, in my presence questioned Pon Wai, after which Pon Wai was

(Testimony of Thomas C. McGuire.)

taken before the defendant Chan Chaun. Chan Chaun was being questioned in a small cubbyhole that is on the top floor of the building. I remained outside the cubbyhole, although I could hear them talking. I heard Major Manning question Pon Wai in Chan Chaun's [39] presence relative to receiving the express tag from the defendant Chan Chaun and Pon Wai stated that he had received the express tag from Chan Chaun.

After receiving instructions from the District Supervisor, I remained with Pon Wai outside, some twenty or twenty-five feet from the defendant Chan Chaun and while there I observed the elevator working. I could see it was in motion on the lower floor. I left Pon Wai standing there and walked in the direction of the elevator and observed a partition or a homemade shelf arrangement that was near the elevator and on this shelf I observed three white porcelain jars; a type of jar that I know contain opium in the underworld channels in San Francisco. These three jars were freshly washed and were in clear view from where I was standing near the elevator. After lifting them and examining them, I observed another jar on the lower shelf in plain view that contained traces of what appeared to be opium on the outside of the jar. This jar was on a shelf below where the three washed jars were. I picked the jars up and took them to my superior, Major Manning. I received further instructions, after which I continued search-

(Testimony of Thomas C. McGuire.)

ing and found implements used for pipe smoking yen shee in close proximity to where the three freshly washing jars were found. The jars marked Government's Exhibit No. 1 For Identification, which you show me, are the jars that were on the second shelf. The washed jars did not of course contain any opium. My initials are on each of these jars. My initials were put on at [40] the time of finding the jars or immediately after. Government's Exhibit No. 2 For Identification, which you show me, are jars which I believe were found by Police Inspector Connolly, while we were searching, and I saw this one found in close proximity to where I found the other jars. My initials are also on these. Government's Exhibit No. 5, which you show me, contains a substance which I found on that occasion and my initials are on this package. They were placed there when the evidence was accumulated together by Mr. Cass; we all placed our initials on them. Government's Exhibit No. 4 For Identification, which you show me, is a package that contains a substance known as yen shee. My initials are on the package. We also found a number of opium pipes. The two packages contain yen shee. That is the residue of opium that has been smoked. The jars contain actual opium that has not been smoked. They were all found in the general proximity of where the original packages were. They were concealed in different places. The opium pipes for instance were in one box. The jars are in the same

(Testimony of Thomas C. McGuire.)

condition as when found on the shelves. The substance contained in these two packages that you show me were in these packages when I found them. They were later placed inside of a paper of our own; that is they were wrapped in brown paper. I did not find them; they were found by the Police Inspector, but I saw him find them.

An elderly man known as the cook, Pon Jeung, who is now sitting in the court-room, came in wearing a cook's apron [41] and he said he was a cook. He was at the scene at the time and I questioned him as to whether he had washed the jars out and he said he had. After questioning the cook with the opium we took him into the presence of the defendant Chaun, Major Manning, Inspector Manion, Mr. Cass and myself. Major Manning and Inspector Manion did the questioning and in the presence of the defendant, Chan Chaun, the cook said that he knew the opium was there but it was not his; that it was opium that belonged to Chan Chaun. The pipes likewise that were there were also shown to the defendant Chan Chaun at the same time the opium was.

“Mr. Duane: Now, if your Honor please, we object to anything of this kind being brought here; we are not charged with anything of this kind in the indictment in this case, and we object to it on the ground it is immaterial, irrelevant, and incompetent, and not within the issues of this case.

(Testimony of Thomas C. McGuire.)

“Mr. Davis: If your Honor please, we are entitled to put it in to show surrounding circumstances; we have established opium there, we have established yen shee, and we are entitled to show as incidental to that that it was being smoked in the premises.

“Mr. Duane: We are not charged with smoking, we are not charged with possession of implements of that kind. The indictment speaks for itself. We are charged with opium and yen shee. I will submit to your Honor’s ruling on that.

“The Court: Of course, it might be a circumstance taken in connection with the presence of the opium; it might [42] be taken into account by the jury, if there is any question in their mind as to whether the opium was temporarily there. I will overrule the objection.

“Mr. Duane: Exception.”

Whereupon two opium pipes, two bowls and scales were marked “U. S. Exhibit 10 For Identification”.

These articles which constitute Exhibit 10 For Identification are used in conjunction with smoking opium, the bowls are put in the stems, the opium is cooked or smoked through the upper bowl, that is, it is not altogether cooked, it is cooked on the bowl and it in turn is inhaled through this part which I indicate. The exhibits which you show me are commonly known as opium pipe stems and the bowls are there. This (indicating) is a Chinese pair

(Testimony of Thomas C. McGuire.)

of scales used to weigh the opium before cooking. The bowls are used in conjunction with the smoking of the opium. The articles constituting Government's Exhibit No. 10 For Identification, which you show me, are the pipes and scales found in the premises in question; my initials were placed there by me at the time they were found. I was present when they were found.

Cross Examination

The articles which constitute Government's Exhibit 10 For Identification, before they could be used for smoking opium would require the use of a vapor oil lamp. This lamp is used for heating the opium.

My attention was first directed to this portion of the [43] premises by reason of the elevator in motion. I do not know whether the elevator car was in operation. I saw the shaft and cable. The elevator shaft was close to the premises that were partitioned off and where the shelves were. In addition to the shelves and what I found there, there were cooking utensils and dishes and a stove. On the other side of the partition there was a sink there with water; the room was equipped for cooking. At the time I saw the cook there he had an apron on and at that time I questioned him. He said that the opium belonged to the boss. I then turned the cook over to Inspector Manion and District Supervisor Major Manning. At that time the cook was taken into custody and he and Chan Chaun

(Testimony of Thomas C. McGuire.)

were both charged. I did not have any difficulty understanding the cook, Pon Yin Jeung; he seemed to understand us and he answered, not in good English, but he understood.

TESTIMONY OF JOHN CONNOLLY FOR THE UNITED STATES

John Connolly, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is John Connolly and I am a police officer connected with the San Francisco Police Department. On the 9th of December of last year I had occasion to be present at the premises of Hing Wah Tai Company at 717 Grant Avenue. I accompanied Inspector Manion and Federal agents to those premises and I was instructed by Inspector Manion to go to the top floor, [44] which I did. I then started a search for narcotics. I went to the kitchen in the rear on the top floor and Agent McGuire searched the kitchen and found the stuff which he has testified to, the jars and opium, some secreted in a teapot and some on shelves. We also found two opium pipes and bowls, Government's Exhibit No. 1 For Identification, which you show me, are the two jars that were found on that occasion. I placed my initials on them at that time. Government's Exhibits 2 and 3 For Identification, which

(Testimony of John Connolly.)

you show me are also the same jars which we discovered on that occasion; I also put my initials on them. Government's Exhibits 4 and 5 For Identification, the packages which you now show me, were discovered on that occasion. They were found in the teapot. The opium pipes and scales and bowls which you show me were discovered there on that day.

Cross Examination

I have been a member of the San Francisco Chinatown Squad for several years and am familiar with the premises at 717 Grant Avenue. There is conducted a general importing and exporting establishment. As I understand it, it was a corporation consisting of about five or six partners and at different times probably two or three employees. I had been to these premises prior to the occasion in question, it was then a gambling house. I have been there since these people have used it as an importing and exporting establishment with Inspector Manion. The cook lives there and Pon Jeung and Chan Chaun lives there. I do not know of any others living there. The [45] Chinese live in different places there. While I was on the fourth floor on the occasion in question the only person that I observed going up or down stairs, with the exception of the agents and the police officers, was Pon Wai. I do not know whether all of the people in that establishment eat their meals there. He told me that he was the cook there and I have known him in the place.

TESTIMONY OF JOHN J. MANION FOR THE
UNITED STATES

John J. Manion, produced as a witness on behalf of the United States, having been first duly sworn, testified substantially as follows:

My name is John J. Manion and I am a police Inspector in the San Francisco Police Department in charge of the Chinatown Squad. I have been a member of the Police Department for thirty-six years and in charge of the Chinatown Squad for the past twenty-two years.

On the 9th of December of last year I went to the premises known as the Hing Wah Tai Company at 717 Grant Avenue. Supervising Agent Manning and myself went to the top floor of the building at 717 Grant Avenue. At that time I saw the defendant there and had a conversation with him. This conversation was in the presence with at least Major Manning, myself and Chan Chaun. He was advised by Major Manning, after he came into the small room that he occupied, that he was under arrest. This room was really on the third floor. There is a half floor [46] which makes it four floors. In other words, there is one floor just above the street, it is really a half floor or mezzanine floor. What you have been calling here a fourth floor is really a third floor. The floor consists of a large open loft and in the loft is a small room occupied by the defendant. The kitchen is also in the rear of this third floor. The elevator entrance is on the left-hand side. The room that the defendant occupied would be on

(Testimony of John J. Manion.)

the south side of the building and on the east end of the building. The room contained clothes, a bed, and a small table with considerable Chinese reading material and books on it. There were several conversations with the defendant on that day. At the first conversation there was present Major Manning, Officer Cass, myself and Officer Connolly was outside of the room door. In that first conversation we brought Pon Wei up to the defendant. I have been on the premises before and I knew the people there. I knew that Pon Wei was a partner in the establishment and that the defendant Chan Chaun was a partner in the establishment and that the defendant Chan Chaun was also supposed to be the manager. When Pon Wei was brought in he was questioned about a tag for baggage and asked where he got it. He said he got it from the defendant Chan Chaun and that Chan Chaun had given it to him to give to the express man. Chan Chaun at that time said he had gotten the tag from a man by the name of Wong in the Bing Tong Building. I asked Chan Chaun where Wong lived and he said he did not know and that he could not tell me where Wong could be found. He said he had met him in the Bing [47] Tong Building and that was all he knew about him. There was a further conversation between Pon Jeung and Chan Chaun, Major Manning and myself. Pon Jeung's attention was called to the opium pipes and bowls that were found in the rear or in the kitchen part of the loft and he, Pon Jeung, said

(Testimony of John J. Manion.)

they belonged to Chan Chaun, that they were Chan Chaun's property and not his. Chan Chaun did not affirm or deny this statement.

Later an interpreter, a Miss Fong, was brought in and there was a further conversation in Chinese. In the first conversation had with the defendant no interpreter was present. The defendant then was questioned in English and replied in English. From our experience in Chinese cases we have found it always well to bring in an interpreter, because later the Chinese come into court and say they do not understand English.

All of the first conversation had with the defendant was in English. As I recall it, we also asked him if he had been out of town and he said he had been in Vancouver, Seattle and Portland. He said that he stayed at the Portland Hotel in Portland on the day of the 29th of November. In all of the testimony that I have given here concerning the conversations with the defendant, these conversations were in English and were made prior to the interpreter being there.

Cross Examination

The premises in question are a three story building, the second story of which is a sort of mezzanine and there are [48] two floors above this; the floor would be about 25 feet front and about 50 feet in depth, the frontage being on Grant Avenue. The room occupied by the defendant is at the front of the building on the Grant Avenue frontage and the

(Testimony of John J. Manion.)

kitchen is at the extreme rear. The room occupied by Chan Chaun is partitioned off at the front end of the building. I do not recall that there is a partition that separates the kitchen from the main floor. I think it is open with the exception of the elevator on the side of it. The elevator is probably 12 to 15 feet from the rear wall of the kitchen. It depends upon where you stand whether or not there is an obstruction between the kitchen and the vicinity of the elevator. If you were on the south side of the building your view might be obstructed to part of the kitchen. If you were on the north side you get a fair view of the kitchen. It is my impression that Chan Chaun was the manager there. There is a man there by the name of Harry Chan also. Up to a couple of years ago the defendant was the manager; since then I could not say. The first conversation I had in the presence of Major Manning, Pon Wei and Pon Jeung and the defendant occurred when Mr. McGuire wanted to see me and tell me he had some information. I believe that at that time Major Manning had the check. I do not recall whether that check was shown to Chan Chaun. I do not recall asking Chan Chaun where he got the check, but I do recall him saying that he got it from a man by the name of Wong in the Bing Tong Building on Waverly Place. He made that statement after he had been [49] confronted by Pon Wei. He told me he had met this man Wong the day before in the Bing Tong Building. I do not recall whether Pon Wei told me

(Testimony of John J. Manion.)

that there were some strange men in the place at the time he got the ticket. I do not recall that he told me he found the ticket on the desk. I recall that he said in the presence of Chan Chaun, "You gave me the ticket". I do not recall Chan Chaun saying, "No, someone else gave you the ticket". Chan Chaun said there were several men in the store at the time; one of the partners and some others were there. I do not recall whether or not Chan Chaun said, "No, I did not give you this ticket, another man gave it to you", and that Pon Wei said, "No, you gave it to me, there was another man there, but you gave me the check". That conversation might have taken place.

Redirect Examination

When the conversation took place between Pon Wei and Chan Chaun, this conversation was spoken in English, and there was no interpreter present.

TESTIMONY OF JOSEPH A. MANNING FOR THE UNITED STATES

Joseph A. Manning, produced as a witness on behalf of the United States, having been first duly sworn, testified as follows:

My name is Joseph A. Manning and I am the District Supervisor of the Bureau of Narcotics and I have acted in this capacity since 1921. On the 9th day of December of last year [50] I had occasion to go to the Hing Wah Tai Company and at that

(Testimony of Joseph A. Manning.)

time I had several conversations with the defendant. Inspector Manion was present during most of the conversation and Agents Cass and McGuire were present during part of the several conversations. During the first conversation, when Inspector Manion was present, there was a Chinese lady interpreter. At that time a Chinese by the name of Pon Wei was brought to the room occupied by Chan Chaun and Pon Wei said in the presence of the defendant, in response to questions put concerning where he had obtained the baggage check, that had been delivered in the building, that he had gotten the baggage check from Chan Chaun. The defendant said, "No, you got the check from another man who was with me," and Pon Wei insisted that he got it from Chan Chaun. Pon Wei said that he received it from Chan Chaun. This conversation took place in English and there was no interpreter present. There was another conversation shortly after the first conversation and Inspector Manion and myself were present. I am not sure whether any of the other agents were there or not. I asked Chan Chaun where he had been during the last month. He told me he had been in Vancouver, Seattle and Portland. He said he was in Portland on November 29th and 30th; that he had stopped at the Portland Hotel. I asked him if he had come down by bus and he said no, that he had come down by train. This conversation was in English. Later an interpreter was brought in, but all of the conversations that I have testified concerning were in English.

(Testimony of Joseph A. Manning.)

Later the conversation was [51] gone over again through the interpreter. I conversed with Chan Chaun for almost an hour. During this time Pon Yin Jeung was brought into the room where Chan Chaun had been sleeping and Pon Jeung, the cook, said that the jar he had in his hand and the opium smoking paraphernalia belonged to Chan Chaun. Agent McGuire had brought this opium to my attention just before he brought the cook into my presence. Chan Chaun did not respond to this. He said nothing. This conversation was in English. The interpreter was not present at that time.

Cross Examination

The defendant told me he had been in Portland on November 29th and 30th. He did not say October 29th. He told me he had been in Seattle. He told me he had stopped at the Portland Hotel and then at a certain hotel in Seattle, the name of which I don't remember, but which name I have in my notes, and that he was in Vancouver and stopped at a hotel in Vancouver, which was verified. I found no record of his registering at the Portland Hotel. We looked for his stopping at the Portland Hotel for the last week in November. I did not do this myself and don't exactly know what the boys up in Portland did. This was done from the Portland office and I do not know how far they traced the thing up there.

Whereupon the Government offered in evidence Exhibits 1 to 10, which had previously been offered for identification. [52]

TESTIMONY OF C. T. CASS, A WITNESS
PREVIOUSLY SWORN, RECALLED FOR
THE UNITED STATES

I have examined all of these exhibits. The package containing the 12 tins, which you show me, I saw when they were taken out of the envelope. I took these exhibits into my possession and turned them over to Mr. Love, the chemist. I took exhibits 1, 2, 3, 4 and 5 into my possession at 717 Grant Avenue on December 9th. They were turned over to me by Agent McGuire and then turned over by me to the Government chemist, Mr. Love.

“Mr. Davis: If your Honor please, at this time the Government wishes to offer in evidence exhibits 1 to 12, inclusive, previously offered for the purpose of identification.

“Mr. Duane: To all of which we object on the ground that they are immaterial, irrelevant and incompetent.

“The Court: They will be admitted in evidence.

“Mr. Duane: We note an exception, if your Honor please.”

Cross Examination

Upon my receiving certain information I made a trip from San Francisco to Davis. We met the bus and talked to the driver, who opened the baggage compartment and brought the black suitcase out with tax No. 9-37-21. We opened the suitcase and found it contained 12 brass cans, which cans were re-

(Testimony of C. T. Cass.)

moved. We then took the cans in the Government automobile wrapped in newspaper. We waited until the bus was changed and when the other bus with the baggage started to San Francisco [53] we followed it. We made inquiry among the passengers concerning whether or not any of them had the corresponding ticket for the check on the suitcase. We questioned one man but found that he had gotten on at Woodland and had no connection with it. I should say there were in the neighborhood of 25 to 30 passengers, as far as I can recall. None of the passengers had boarded the bus at Hornbrook. I do not recall whether any of the passengers boarded the bus at Portland. The only investigation made was to ask various passengers whether or not they were the owners of the suitcase. I did not go to Portland in connection with this investigation. I know that an investigation was made at Portland to ascertain who the person was that checked the bag at the Greyhound bus depot there. That investigation was made by the Portland office. From the time that the suitcase was placed on the bus at Davis, after the removal of the cans, the suitcase contained no opium on the trip to San Francisco. Since the arrival of the bag at the Greyhound bus depot at San Francisco it has been in the custodian's safe in our office. I was present when the bag was delivered to 717 Grant Avenue. I rode up to that place on the truck of the Canton Express and when about 25 or 30 feet from the place I got off the truck while the driver went in with the suitcase.

(Testimony of C. T. Cass.)

I followed him thereafter as he walked in the door. When he brought the suitcase in the door he left it on the floor and walked out. It was left on the open or ground floor of this place of business. There was a railing along the side and some desks. It was like [54] a reception room. There may be some merchandise stacked up in the front part of the store. The suitcase was brought in and placed on the floor where anybody could see it. I would say that at that time there were several persons in the place. Lai Quong and Pon Wei were there. There were several others. I was present at one of the conversations in the presence of Inspector Manion, Major Manning, Pon Wei and the defendant. I was present when Pon Wei said, "I received the check from Chan Chaun", and Chan Chaun said, "No, you did not". Pon Wei was asked the question, "Where did you get that check from?", and he said, "I got it from Chan Chaun", pointing to the defendant, and Chan Chaun said, "No, you got it from somebody else", but he said, "No, I got it from you", and they argued back and forth and Chan Chaun finally said, "No, somebody else handed you the check there", and Pon Wei said, "No, you possibly might have taken it from him, or something like that, but you are the one that gave it to me". Pon Wei said, "No, there was another man there, but you gave me the check". As I recall, Chan Chaun said that a Wong man gave him the check. I remember the name Wong. I do not remember the first name.

TESTIMONY OF PON YIN JEUNG FOR THE
UNITED STATES

Robert L. Park was sworn as an interpreter and thereafter the testimony was given through the interpreter.

My name is Pon Yin Jeung and I work for the Hin Wah Tai Company located at 717 Dupont Street or Grant Avenue and have [55] worked there since the firm started four or five years ago. I have been in this country over 30 years. I do not speak English at all. I have been working among Chinese. I was in the Hing Wah Tai premises on December 9th of last year. I was there in the presence of Inspector Manion, Major Manning and Mr. Cass. I did not have a conversation with them in English. I don't speak a word of English. They did not ask me in English whether certain opium which they had found there belonged to me and I did not say, "No, it belonged to Mr. Chan Chaun". I don't know that. I don't think so. I asked them to ask Chan Chaun. I said this to them in Chinese.

JOSEPH A. MANNING, A WITNESS PREVIOUSLY
SWORN, RECALLED FOR THE
UNITED STATES

I have been a District Supervisor of Narcotics since 1924 and have been with the Bureau of Narcotics since 1921 and I have been concerned with many cases involving smoking opium. I am familiar because of my position with the price of opium.

(Testimony of Joseph A. Manning.)

I know what the price was on the 9th day of December, 1942. Each of the cans here contain $6\frac{2}{3}$ ounces of opium. There are 437 grains of opium to an ounce and in the Chinatown San Francisco market it sells for around \$1 a grain. Each of these cans would hold about 2800 grains. In wholesale lots by the can it probably would sell, at that time, for \$600 or \$700 a can. They break it down again from the cans into jars and sell them for about \$100 a jar wholesale. It is then broken down into what is known as bindles, which sell for about \$1 a grain. The wholesale cost of a five-tael tin of opium would be [56] approximately \$600. The jobber or middleman's price would be about \$1000 or \$1200 and if the five-tael tin were broken into bindles it would be worth about \$2800.

Cross Examination

There is no legitimate price for opium. I cannot state what the market value of opium was on any particular date but I base my opinion on the fact that we buy opium from time to time as evidence and pay for it with Government money and we know how much it costs. The price we pay would not be higher than the ordinary addict would pay.

Whereupon, at the conclusion of the evidence offered on behalf of the United States, counsel for the defendant moved the Court for a directed verdict of not guilty.

“Mr. Duane: Then if we consider the case of the Government closed, I desire to make a motion for a directed verdict, and I first want to direct your Honor’s attention to the indictment in this case. The second count of the indictment from the Northern Division charges that on or about the 1st of December, at Davis Junction, in the County of Yolo, within the Northern Division of the Northern District, the said defendant did unlawfully, knowingly, fraudulently and feloniously conceal and did facilitate the concealment of a certain derivative of preparation of opium. That is the charge, the concealment and the facilitating of concealment of opium, and, further, that it was done knowingly. Also, that the derivative of opium had been imported into the United States contrary to law, which the de- [57] fendant then and there well knew.

“There are two features of this case that the prosecution or the Government was required to establish to a moral certainty and beyond a reasonable doubt; one was the concealment or the facilitation of concealment on the part of this defendant knowingly; also evidence to the effect that the opium was imported into the United States contrary to law, and that the defendant knew it.

“I want to simply base my motion on the insufficiency of the evidence, I will say the utter lack of evidence; there is no evidence, they have been silent on the subject of concealment and of knowledge. In each instance, I will take the indictment covering the features of the case in this division, which is as

to opium contained on the premises at 717 Grant Avenue, there is not one word relative to concealment, but, to the contrary, Mr. McGuire testified it was in plain sight, so that it was not concealed. There is not any evidence directly connecting this defendant with any of the opium alleged to have been found at 717 Grant Avenue. To the contrary, the witness testified that this cook said that it belonged to Chan Chaun. The cook himself says that he did not say anything of the kind, and the cook was a witness produced by the Government. However, notwithstanding whether the narcotics or the opium belonged to the defendant, I repeat, your Honor, there was absolutely no evidence of any concealment in either instance, or any evidence of knowledge. [58]

“I think probably the leading case on that subject is *Kalos v. United States*, 9 Fed.(2) at 268, which says the burden is on the government to establish those two elements, first, the concealment by the defendant, and also the knowledge of concealing it and knowledge that it was imported into the United States contrary to law.

“Mr. Davis: If your Honor please, on the first question brought out by Mr. Duane, I do not believe that that could possibly be the law as to proof of guilty knowledge. Section 3 of the Jones-Miller Act provides that on and after July 1, 1913 all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the 1st day of April,

1904, and the burden of proof shifts upon the affiant or the accused to rebut that presumption.

“The government does not have to prove guilty knowledge upon the part of any person found in the possession of narcotics, that they knew it was imported illegally. It is unlawful to import it, and by Section 3 of the Jones-Miller Act the presumption arises that the defendant owned it, and it is up to him to show how he could have gotten it legally, so I do not think that that should concern us.

“The second proposition, your Honor, that Mr. Duane raises as to the opium found in 717 Grant Avenue, that it was in the open and there was no concealment, I think that Mr. Duane is applying an erroneous construction to the word ‘concealed’ as used in the statute, because numerous cases under the statute [59] define concealed to mean possession, it does not mean that you have to look it up.

“Now, as to the other point, we have witnesses who testified as to the evidence found on 717 Grant Avenue, that the cook said that it belonged to Chan Chaun, and Chan Chaun did not deny it. We had the cook on the stand and he said he did not say that. Obviously, that is a question for the jury, between what the cook said then and now, or what the agents say he said. As far as I can see the only question here is whether or not the government has sufficiently connected up the defendant with the opium that was found, and I say that we have, because we have established the check with the bag that has the baggage check on it. As far as the con-

concealment is concerned the indictment alleges that the opium was concealed in Davis, not in San Francisco, because it was taken out, and if the defendant put the bag containing the opium beyond his control he was concealing it and facilitating the concealment of it, no matter where it went at all times, even if he was not there to have accepted it.

“On the other point, as I say, your Honor, the only question as far as I can see that your Honor would have to consider on a motion for directed verdict would be whether or not the Government’s evidence has sufficiently connected up the defendant. I say we have established the checking of the bag, the bag contained opium, and we have traced the checked bag to the defendant. That is on the first case. As to whether the jury [60] will believe that he had the check himself, or got it from somebody else, that is also a question for the jury, but we have established by the witnesses that he was the man that turned the check over for it to be delivered.

“As to the question, as to possession of opium at 717 Grant Avenue, we have the direct testimony of three witnesses who said they found it, and in his presence he was accused of having it, and he continued to deny it, but I do not see any merit in Mr. Duane’s contention on this issue of the word ‘concealment’ or on the presumption of guilty knowledge.

“Mr. Duane: If your Honor please, in answer to the first proposition, the enactment of that section which has to do with a presumption occurred in the

year 1913. The case that I cited to your Honor is a case from the Circuit Court of Appeals for the Eighth Circuit, which was decided in 1925, twelve years after the enactment of this section that Mr. Davis speaks of. The Court in that case passed upon the question and in the face of that section found or declared that the burden was upon the government to prove to a moral certainty and beyond a reasonable doubt the knowledge and the concealment and the knowledge that the opium was imported into the United States contrary to law.

“Now, on the question of the checking of the bag, I do not see where Mr. Davis gets the idea that the defendant was connected with it. There has been absolutely no evidence to establish that the defendant had anything to do with the check- [61] ing of the bag. As a matter of fact, I think Sergeant Manion or Inspector Manion, and I believe also Major Manning testified that in their conversation with the defendant he said he was in Portland on November 30th, and if you will take a look at the check on the bag it was checked on November 20, so it does not connect him up, at all.

“The Court: Is it your contention that there would have to be evidence that the defendant checked the bag?

“Mr. Duane: There must be some evidence somewhere to connect the defendant with the bag, whether he checked it or what he did with it.

“The Court: There is testimony it was traced and that would be some evidence from which the jury could draw a reasonable inference.

“Mr. Duane: The evidence of the possession of the bag, itself, I do not believe is a matter of sufficient value. Pon Wei had the check, the same as the prosecution or the government, here, says that the defendant had the check.

“The Court: As I recall the testimony, Pon Wei said that the defendant had told him to go and arrange to get the bag with the check.

“Mr. Duane: Further than that, Pon Wei testified here that the check was not given to him by the defendant. He said it was on his desk. He did not know who put it on his desk, and that the defendant said to him, ‘Pick up that baggage’, that [62] was all. Now, let us say that the defendant had the possession of the check. That, of itself, is not sufficient. There must be knowledge, and it must be established that the defendant had knowledge that the check represented baggage containing opium, and that that opium had been imported into the United States contrary to law.

“The Court: I think that there is sufficient evidence to go to the jury, and under the circumstances of the case I will deny the motion. Bring the jury in.”

LEE KING, A WITNESS ON BEHALF OF
THE DEFENDANT

Lee King, called as a witness on behalf of the defendant, being first duly sworn, testified substantially as follows:

My name is Lee King and I reside at 717 Grant Avenue and was living there on the 9th of December of 1942. I have lived there ever since that firm was established. I am a Chinese bookkeeper and cashier for the Hing Wah Tai Company. I am also an accountant and one of the owners of the company. I have occupied a room at 717 Grant Avenue. I know the defendant Chan Chaun. I was present on the 8th day of December, 1942, in the store with Chan Chaun while he was talking to a man by the name of Wong. This man asked for the price of merchandise and I told him. He was talking to one of the customers who had a piece of baggage that he wanted brought in and Chan said, "That is all right, you just leave that here and we will take care of it". I did not see him put the tag down but I saw him [63] walk out. I do not know the man and had not seen him before that day.

Cross Examination

I have not seen this man since. I have worked for the Hing Wah Tai Company from the time he first started; I am also one of the partners. I have been there for about five and a half years. Chan Chaun is also a partner.

(Testimony of Lee King.)

Redirect Examination

Occasionally when a customer comes in and asks us to pick up baggage we do it as an accommodation. I take my meals at 717 Grant Avenue and other people do. I have a room there and so has Chan Chaun and other people there. Chan Chaun and myself, the cook and the porter live there. I also have access to the kitchen. Besides the people living at 717 Grant Avenue, other people working there go in and out of the kitchen. There is a store-room there and some of our customers go upstairs to select goods. We keep merchandise on that floor. We get our meals on the mezzanine floor. There is a table there.

Recross Examination

The firm of Hing Wah Tai is engaged in the importing and exporting of Chinese goods. On other occasions we have picked up baggage for customers. We have a truck of our own. The man that I testified concerning I never saw before or since, nor have I seen him back in the store since that time.

[64]

PON YIN JEUNG CALLED AS A WITNESS
FOR THE DEFENDANT

Pon Yin Jeung, previously sworn, was called as a witness for the defendant and testified substantially as follows:

I have been a cook at 717 Grant Avenue since the firm was established. I live there. I prepare the food for those employed there. The people employed there go into the kitchen.

Cross Examination

Four people live at 717 Grant Avenue. Myself, Chan Chaun, Lee King and Mah Hoy.

TESTIMONY OF PON WEI CALLED AS A
WITNESS FOR THE DEFENDANT

Pon Wei, having been previously sworn, was called as a witness for the defendant and testified substantially as follows:

I do not live at 717 Grant Avenue. I am by occupation a receiving and shipping clerk. I take my meals at 717 Grant Avenue. Other people also eat there. I have occasion to go into the kitchen located on the fourth floor all of the time.

TESTIMONY OF CHAN CHAUN
THE DEFENDANT

Chan Chaun, the defendant, called in his own behalf having been first duly sworn, and examined through interpreter Park, testified substantially as follows:

My name is Chan Chaun and I am the defendant in this case. I am 55 years of age and I am married and I am the father of two sons and one daughter. I have a son and wife in China and a son and daughter here. I am a member of the firm of Hing [65] Wah Tai and have been a member of that firm for over four years. I live at 717 Grant Avenue. I went to Vancouver and visited there. On my way to Vancouver I stopped at Portland. I think it was on November 30th—no October 30th.

“Mr. Duane: When were you in Portland?

A. I thing November 30.

Q. What? A. November 30.

Q. You were in Portland November 30?

A. October 30.”

I left San Francisco October 29th and my first stop was in Portland. I left San Francisco the night before and the next day landed at Portland where I stayed one day. While there I visited some of my customers. I then went to Seattle where I stayed three or four days and again visited my trade and customers. While there in Seattle I visited the Chinese Consul, because I wanted to take a train over to Vancouver and I wanted to get a special

(Testimony of Chan Chaun.)

permit from the Consul to go over by train instead of on the boat. I visited the Chinese Consul at Seattle on November 2nd. The letter that you show me dated November 2, 1942 is the one I took with me when I went to Vancouver. I got this letter from the Consulate.

Whereupon the letter was marked "Defendant's Exhibit A For Identification."

I went to Vancouver on either the 3rd or 4th of November. I went there for the purpose of buying goods and I bought over \$6,000 worth of goods. I dealt with a customs broker there but I do not remember his name. I have his card here. This card was given to me on coming back to this city to see Mr. Hooper. Mr. Hooper is also a customs broker located across from the Postoffice in San Francisco. The papers which you show me entitled "Consumption entry, United States Customs [66] Service" are ones that Mr. Robinson sent up to me. Mr. Robinson is connected with the Hooper firm, customs brokers.

Whereupon the document was marked "Defendant's Exhibit B For Identification."

On November 20th I was in Seattle taking a train back to San Francisco. I was not in Portland on November 30th of 1942. Government's Exhibit No. 7, which you show me, is not my bag. I did not check this bag in Portland, nor have I ever seen this bag before. On December 9, 1942, I saw a grip that Major Manning brought up. I do not know whether this is the one or not, it looks like it.

(Testimony of Chan Chaun.)

Government's Exhibit 8, which you show me, I have seen before. That check was brought in by a customer by the name of Wong Jock Mong and he asked me as an accommodation to have it picked up. He came into the store and asked me for the price of some goods and then he said, "I have a check here, will you have it brought up for me?" I told him I would and told him to leave the check on the desk or table, which he did. I later told Pon Wei to have the baggage picked up. Wong did not tell me what the suitcase contained. He just said there was a piece of baggage that he wanted picked up. I did not see Wong before this time. The night before I met him at the Bing Hong Tong and he said he had come in from Portland to buy goods and would come down to my store. He told me where he was living and what goods he was going to buy. The Bing Hong is the Tong to which I belong and Wong is also a member of the Tong. I [67] told Inspector Manion and Major Manning that I had met this man Wong at the Tong the day before.

Government's Exhibits 1, 2 and 3, which you show me, are not my property, nor did I ever have those jars in my possession, nor did I ever see them, nor did I ever put them in the kitchen at 717 Grant Avenue. Government's Exhibits 4 and 5, which you show me, I have never seen before. I did not have yen shee at 717 Grant Avenue. I never saw it before. Government's Exhibit No. 10, which you show me, consisting of parts of pipes and a scale did not belong to me.

(Testimony of Chan Chaun.)

Government's Exhibit No. 6, which you show me, is a carton containing 12 brass cans, is not my property, nor have I ever seen it before, nor did I check anything like it at Portland at any time.

Cross Examination

I did not know this man Wong Jock Mong until I met him the first time and I have never seen him again.

I have been in San Quentin. I was convicted of smoking opium.

Whereupon Defendant's Exhibit A For Identification was offered and received in evidence as defendant's exhibit.

Said Defendant's Exhibit A, in evidence, on the letterhead of the Consulate of the Republic of China, Seattle, Washington, November 2, 1942, reads as follows:

"To Whom It May Concern:

This is to certify that the bearer, Mr. Chan [68] Chaun, General Manager of Hing Wah Tai & Company, 717 Grant Avenue, San Francisco, California, is going to Vancouver on business for a few days."

(Signed) HSIAO-WAN TAO,
Vice Consul."

Whereupon the defendant rested his case.

Whereupon it was stipulated by and between counsel for the United States and counsel for the defendant that the records of the Superior Court of the State of California, in and for the City and County of San Francisco, would show that the defendant had been convicted of the possession of smoking opium in violation of the State Poison Act.

Whereupon the cause was argued to the jury by counsel for the Government and for the defendant.

Thereafter, the arguments having been concluded, the Court instructed the jury.

Thereafter, the instructions to the jury having been concluded, the case was submitted to the jury and thereafter the jury returned into court and rendered a verdict finding the defendant guilty on counts Three and Four of Indictment No. 27868-G and guilty on Indictment No. 8362 (Sac.).

Thereafter counsel for the defendant moved the Court for a new trial, which said motion for a new trial was as follows:

“Now Comes the defendant Chan Chaun in the above entitled action, and moves this Honorable Court for an order [69] vacating the verdict of the jury convicting said defendant, and granting said defendant a new trial on each and every count of the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

“1. That the verdict is contrary to the evidence adduced at the trial herein;

“2. That the verdict is not supported by the evidence in the cause;

“3. That the evidence adduced at the trial is insufficient to justify said verdict;

“4. That said verdict is contrary to law;

“5. That the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by said defendant;

“6. That the trial court erred in refusing to give certain instructions proposed by said defendant, and to which ruling of the court said defendant duly and regularly excepted;

“7. That the trial court erred in refusing to direct a verdict of ‘not guilty’ at the close of the evidence of the United States;

“8. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid;

“To all of which motions said defendant duly and regular- [70] ly excepted.

“This motion is made upon the minutes of the Court and upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial.

Dated: August, 1943.

WALTER H. DUANE

Attorney for Defendant”

Said motion for a new trial was by the Court denied, to the denial of which the defendant duly excepted.

Thereafter counsel for the defendant moved the Court in arrest of judgment, which motion in arrest of judgment is as follows:

“[Title of Court and Cause.]

“Comes Now Chan Chaun, defendant in the above entitled action, against whom a verdict of guilty was rendered on the 7th day of August, 1943, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant on each and every count of said indictment.

“1. That the indictment and each and every count thereof in this cause, does not state facts sufficient to constitute a public offense under the laws of the United States;

“2. That said indictment and each and every count thereof is uncertain, unintelligible and ambiguous and insufficient in law to apprise said defendant of the nature of the charge or charges against him; [71]

“3. That the evidence is not sufficient to support the verdict as to any of the counts of said indictment;

“4. That the verdict on each and every count of said indictment is contrary to law.

“Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court, and said defendant prays that this motion be sustained and the judgment of conviction against defendant

be arrested and held for naught, and that said defendant have all such other orders as may seem meet and just in the premises.

WALTER H. DUANE

Attorney for Defendant”.

Which said motion in arrest of judgment was by the Court denied, to the denial of which the defendant duly and regularly excepted.

The said motions for a new trial and in arrest of judgment having been denied, the Court proceeded to pass judgment upon the defendant, and, thereafter, and on August 7, 1943, the Court imposed judgment and sentence upon the defendant as follows: That in case No. 8362 the defendant serve a term of two years in a United States Penitentiary, to be designated by the Attorney General of the United States, and pay a fine of \$500.00.

That in case No. 27868-G on Count Three thereof, the defendant serve a term of one year and one day in a United States Penitentiary, to be designated by the Attorney General [72] of the United States and pay a fine in the sum of \$100.00; that on Count Four the defendant be confined in a United States Penitentiary, to be designated by the Attorney General of the United States, for a period of one year and one day and pay a fine of \$100.00; the judgments on Counts Three and Four of Indictment 27868-G to run concurrently; and the judgment imposed on said Counts Three and Four of Indictment 27868-G to run concurrently with the judgment imposed on Indictment No. 8362 (Sac.).

That the above Bill of Exceptions contains all of

the evidence, oral and documentary, and all of the proceedings relating to the trial, conviction, motion for a new trial, motion in arrest of judgment and judgment and sentence.

Dated: San Francisco, California, September 17th, 1943.

WALTER H. DUANE

JAMES B. O'CONNOR

Attorneys for Defendant
and Appellant [73]

[Title of District Court and Cause—No. 27868-G,
No. 8362 (Sac.).]

ASSIGNMENT OF ERRORS

Chan Chaun, the defendant in the above entitled action, and plaintiff on appeal herein, having appealed to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgments and sentences entered in the above entitled cause against him, and said defendant having given notice of appeal, as provided by law, now makes and files the following Assignment of Errors herein, upon which he will rely for a reversal of the judgments and sentences upon appeal and which error and each of them are to the great detriment, injury and prejudice of said defendant and in violation of the rights conferred upon him by law, and the defendant says that in the recorded proceedings of the above entitled cause upon the hearing and determination thereof, in the Southern Division of the

United States District Court for the Northern District of California, there is manifest error in this, to-wit:

I.

That the court erred in denying the motion of the [74] defendant for a directed verdict of not guilty, made at the conclusion of the testimony on behalf of the United States, upon the ground that the evidence was insufficient as a matter of law to support a conviction of the defendant.

II.

That the court erred in denying the defendant's motion for a new trial.

III.

That the court erred in denying the defendant's motion in arrest of judgment.

IV.

That the court erred during the course of the trial in receiving in evidence Government's Exhibit 10, consisting of two opium pipes, two bowls and scales, to the offer and acceptance of which evidence the defendant objected upon the ground that such evidence was immaterial, irrelevant and incompetent and not within the issues of the case, and to the acceptance of which evidence defendant excepted.

Wherefore, because of the manifest errors committed by the court, the defendant prays that said judgments and convictions and sentences be reversed, and for such other and proper relief as to the court may seem meet and proper.

Dated: San Francisco, Calif. September 17th,
1943.

WALTER H. DUANE
JAMES B. O'CONNOR

Attorneys for Defendant
and Appellant [75]

[Title of District Court and Cause—No. 27868-G,
8362 (Sac.).]

STIPULATION RE: BILL OF EXCEPTIONS

It Is Hereby Stipulated by and between the attorneys for the United States and the attorneys for the defendant that the foregoing Bill of Exceptions on behalf of the above named defendant on appeal herein to the Circuit Court of Appeals in and for the Ninth Circuit is in proper form and conforms to the truth and that the same may be settled, allowed, signed and authenticated by this Court as the true Bill of Exceptions herein on behalf of said defendant and that it may be made part of the record in this case.

FRANK J. HENNESSY

United States Attorney

W. EHNKING

Assistant United States
Attorney

Attorneys for Plaintiff

WALTER H. DUANE

JAMES B. O'CONNOR

Attorneys for Defendant [76]

[Title of District Court and Cause—No. 27868-G,
8362 (Sac.).]

ORDER SETTLING, ALLOWING AND AU-
THENTICATING BILL OF EXCEPTIONS
AND MAKING THE SAME PART OF THE
RECORD.

The foregoing Bill of Exceptions duly presented by the defendant Chan Chaun and duly agreed to by the respective parties hereto, having been duly presented to the Court within the time allowed and required by law, as extended, and by the rules and orders of this Court, duly and regularly made in that behalf, is hereby settled, allowed, signed and authenticated as in proper form and in conformity with the truth and as the true Bill of Exceptions herein and is hereby made a part of the record in this case.

Dated: November 30, 1943.

LOUIS E. GOODMAN

United States District Judge.

[77]

Receipt of a copy of the within Bill of Exceptions of Defendant Chan Chaun and Assignment of Errors is hereby admitted this 17 day of September, 1943

FRANK J. HENNESSY,

United States Attorney

General

By.....

Assistant United States

Attorney

[Endorsed]: Lodged Sept. 17, 1943. Filed Nov. 30, 1943. [78]

[Title of District Court and Cause.]

PRAECIPE ON APPEAL

To the Clerk of the above entitled Court:

The appellant herein respectfully requests the inclusion of the following as part of the record on appeal herein:

1. The indictments in case No. 27868-G and case No. 8362 (Sac.).
2. Notice of appeal.
3. The assignment of errors.
4. Bill of exceptions.
5. Judgment and sentence.
6. Motion for a new trial.
7. Motion in arrest of judgment.
8. Order denying new trial.
9. Order denying motion in arrest of judgment.
10. Orders extending time re bill of exceptions.
11. Order settling, allowing and authenticating bill of exceptions.
12. Stipulations re bill of exceptions.
13. Plea of defendant.
14. Order consolidating causes for trial.
15. Verdict.

Dated: December 15, 1943.

WALTER H. DUANE

JAMES B. O'CONNOR

Attorneys for Appellant.

[Endorsed]: Filed Dec. 15, 1943. [79]

In the Northern Division of the United States
District Court for the Northern District of
California

(No. 8362—INDICTMENT)

In the October 1942 Term of said Division of said
District Court, the Grand Jurors thereof upon their
oaths present: That

CHAN CHAUN

whose full and true name is, other than hereinabove
stated, to said Grand Jurors unknown (hereinafter
called "said defendant"), heretofore, to-wit, on or
about the 1st day of December, 1942, at Davis Junction,
in the County of Yolo, within said Northern
Division of the Northern District of California, did
unlawfully, knowingly, fraudulently and feloniously
conceal and facilitate the concealment of a certain
derivative and preparation of Opium, to-wit,
Smoking Opium, in quantity particularly described
as approximately 80 ounces of Smoking Opium contained
in 12 five tael brass cans in a suitcase in and
on Bus No. 401 of the Pacific Greyhound Bus Company,
which said smoking opium had been imported
into the United States of America contrary to law,
as said defendant then and there well knew. (T. 21
USCA, 174)

FRANK J. HENNESSY

United States Attorney

By EMMET J. SEAWELL

Assistant U. S. Attorney

[Endorsed]: No. 8362. A true bill, John S. Boitano,
Foreman. Filed Mar. 22, 1943. Walter B. Maling,
Clerk. [80]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 14th day of April, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

ORDER CONSOLIDATING WITH CASE No.
27868-G, AND SETTING CONSOLIDATED
CASES FOR TRIAL

This case came on this day to be set for trial. James T. Davis, Assistant United States Attorney was present for and on behalf of the United States. The defendant Chan Chaun was present with Walter H. Duane, Esq., his attorney. On motion of Mr. Davis and by consent of Mr. Duane, it is Ordered that case No. 27868-G—United States of America vs. Chan Chaun, pending in the Southern Division of this Court be, and the same is hereby consolidated with this case for trial. After further hearing the attorneys, it is Ordered that this case and consolidated case No. 27868-G, be and the same are hereby set for May 27, 1943, for trial, at San Francisco, California. [81]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 27th day of May, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, District Judge.

[Title of Cause—No. 8362. Criminal.]

ORDER RE-SETTING CONSOLIDATED CASES

On motion of Walter H. Duane, Esq., attorney for defendant and by consent of James T. Davis, Esq., Assistant United States Attorney, it is Ordered that this case and case *and case* No. 27868-G—United States of America vs. Chan Chaun, pending in the Southern Division of this Court, heretofore consolidated with this case for trial, be and the same are hereby re-set for June 8, 1943, for trial. [82]

[Title of District Court and Cause—No. 8362.]

VERDICT

We, the Jury, find Chan Chaun, the defendant at the bar, Guilty.

W. F. SISSON

Foreman.

[Endorsed]: Filed August 5, 1943, at 4 o'clock and 25 minutes P.M. C. W. Calbreath, Clerk. By J. A. Schaertzer, Deputy Clerk. [83]

[Title of District Court and Cause—No. 8362.]

MOTION OF DEFENDANT IN ARREST
OF JUDGMENT

Comes now Chan Chaun, defendant in the above entitled action, against whom a verdict of guilty was rendered on the 5th day of August, 1943, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and hold for naught the verdict of guilty rendered against said defendant on each and every count of said indictment.

1. That the indictment and each and every count thereof in this cause, does not state facts sufficient to constitute a public offense under the laws of the United States;

2. That said indictment and each and every count thereof is uncertain, unintelligible and ambiguous and insufficient in law to apprise said defendant of the nature of the charge or charges against him;

3. That the evidence is not sufficient to support the verdict as to any of the counts of said indictment;

4. That the verdict on each and every count of said indictment is contrary to law.

Wherefore, because of which said errors in the record herein, no lawful judgment may be rendered by the Court, and said defendant prays that this motion be sustained and the judgment of conviction against defendant be arrested and held for naught,

and that said defendant have all such other orders as may seem meet and just in the premises.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed Aug. 7, 1943. [84]

[Title of District Court and Cause—No. 8362.]

MOTION FOR A NEW TRIAL

Now comes the defendant Chan Chaun in the above entitled action, and moves this Honorable Court for an order vacating the verdict of the jury convicting said defendant, and granting said defendant a new trial on each and every count of the indictment herein, for the following and each of the following causes, materially affecting the constitutional rights of said defendant:

1. That the verdict is contrary to the evidence adduced at the trial herein;

2. That the verdict is not supported by the evidence in the cause;

3. That the evidence adduced at the trial is insufficient to justify said verdict;

4. That said verdict is contrary to law;

5. That the trial court erred in admitting evidence in the course of the trial which was incompetent, irrelevant and immaterial, which errors were duly and regularly excepted to by said defendant;

6. That the trial court erred in refusing to give certain instructions proposed by said defendant, and to which ruling of the court said defendant duly and regularly excepted;

7. That the trial court erred in refusing to direct a verdict of "not guilty" at the close of the evidence of the United States;

8. That the trial court erred in admitting evidence in the course of the trial where no proper foundation had been laid;

To all of which motions said defendant duly and regularly excepted. [85]

This motion is made upon the minutes of the Court and upon all records and proceedings in said action, and upon all the testimony and evidence introduced at the trial.

Dated: August 7th, 1943.

WALTER H. DUANE

Attorney for Defendant

[Endorsed]: Filed Aug. 7, 1943. [86]

District Court of the United States
Northern District of California, Northern Division
No. 8362. Criminal Indictment in One count for
violation of U. S. C. A. Title 21, Sec. 174
(Possess and conceal narcotic drugs)

UNITED STATES

v.

CHAN CHAUN

JUDGMENT AND COMMITMENT

On this 7th day of August, 1943, came the United States Attorney, and the defendant, Chan Chaun, appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the Indictment in the above-entitled cause, to-wit: Viol. of Title 21, USCA, Sec. 174 (Possess and conceal narcotic drugs)—defendant, on December 1, 1942, at Davis Junction, California, did conceal and facilitate the concealment of a certain derivative and preparation of Opium, to-wit, Smoking Opium in quantity particularly described as 80 ounces of Smoking Opium contained in 12 five tael brass cans, which said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years and pay a fine to the United States of America in the sum of Five Hundred and no/100 (\$500.00) Dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law. [87]

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

LOUIS E. GOODMAN

United States District Judge

The Court recommends commitment to a U. S. Penitentiary.

Entered and filed this 7th day of August, 1943.

C. W. CALBREATH,

Clerk,

By J. A. SCHAERTZER,

Deputy Clerk.

Examined by:

JAMES T. DAVIS,

Asst. U. S. Atty. [88]

[Title of District Court and Cause—No. 8362.]

NOTICE OF APPEAL

Name and Address of Appellant: Chan Chaun,
717 Grant Avenue, San Francisco, California.

Name and Address of Appellant's Attorney:
Walter H. Duane, Esq., 490 Mills Building, San
Francisco, California.

Offense: Violation of Jones-Miller Act, Title 21,
U. S. C. A., Section 174.

That the defendant on or about the first day of December, 1942, at Davis Junction in the County of Yolo, State of California, within said Division and District, did unlawfully, knowingly, fraudulently and feloniously conceal and facilitate the concealment of a certain derivative and preparation of Opium, to-wit, Smoking Opium, in quantity particularly described as approximately 80 ounces of Smoking Opium contained in 12 five tael brass cans

in a suitcase, which said Opium had been imported into the United States of America, contrary to law, as said defendant then and there well knew.

Date of Judgment: August 7, 1943.

Description of Judgment and Sentence: "Guilty" as charged in said Indictment; two (2) years imprisonment and \$500.00 fine.

Name of Prison Where Now Confined: County Jail of the City and County of San Francisco, under five (5) days stay of execution. [89]

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeal of the Ninth Circuit, from the judgment above mentioned, on the grounds set forth below.

GROUND OF APPEAL

1.

That the learned trial Judge committed errors in law arising during the course of the trial, and erred in the decision of questions of law arising during the course of the trial.

2.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

3.

That the learned trial Judge erred in denying the motion made by counsel for defendant for a directed verdict of "Not Guilty" at the conclusion of the case of the prosecution, for the reason that

taking said evidence in said case is not sufficient as a matter of law to support a verdict of "Guilty".

4.

That the trial court erred in not instructing the jury to return a verdict of "Not Guilty" in favor of appellant.

Dated: August 9, 1943.

CHAN CHAUN

Appellant

WALTER H. DUANE

Attorney for Appellant

(Receipt of Service.)

[Endorsed]: Filed Aug. 10, 1943. [90]

[Title of District Court.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 90 pages, numbered from 1 to 90, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America, vs. Chan Chaun, *vs. Chan Chaun*, and The United States of America, vs. Chan Chaun, No. 8362, Consolidated Cases, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$11.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of January, A. D. 1944.

C. W. CALBREATH,
Clerk,
W. E. VAN BUREN,
Deputy Clerk.

[Seal]

[Endorsed]: No. 10,525. United States Circuit Court of Appeals for the Ninth Circuit. Chan Chaun, Appellant, vs. United States of America, Appellee. Transcript of Record Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 20, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10,525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

WALTER H. DUANE,

Mills Building, San Francisco 4, California,

JAMES B. O'CONNOR,

Balfour Building, San Francisco 4, California,

Attorneys for Appellant.

FILED

MAR 29 1944

PAUL P. O'BRIEN,
CLERK

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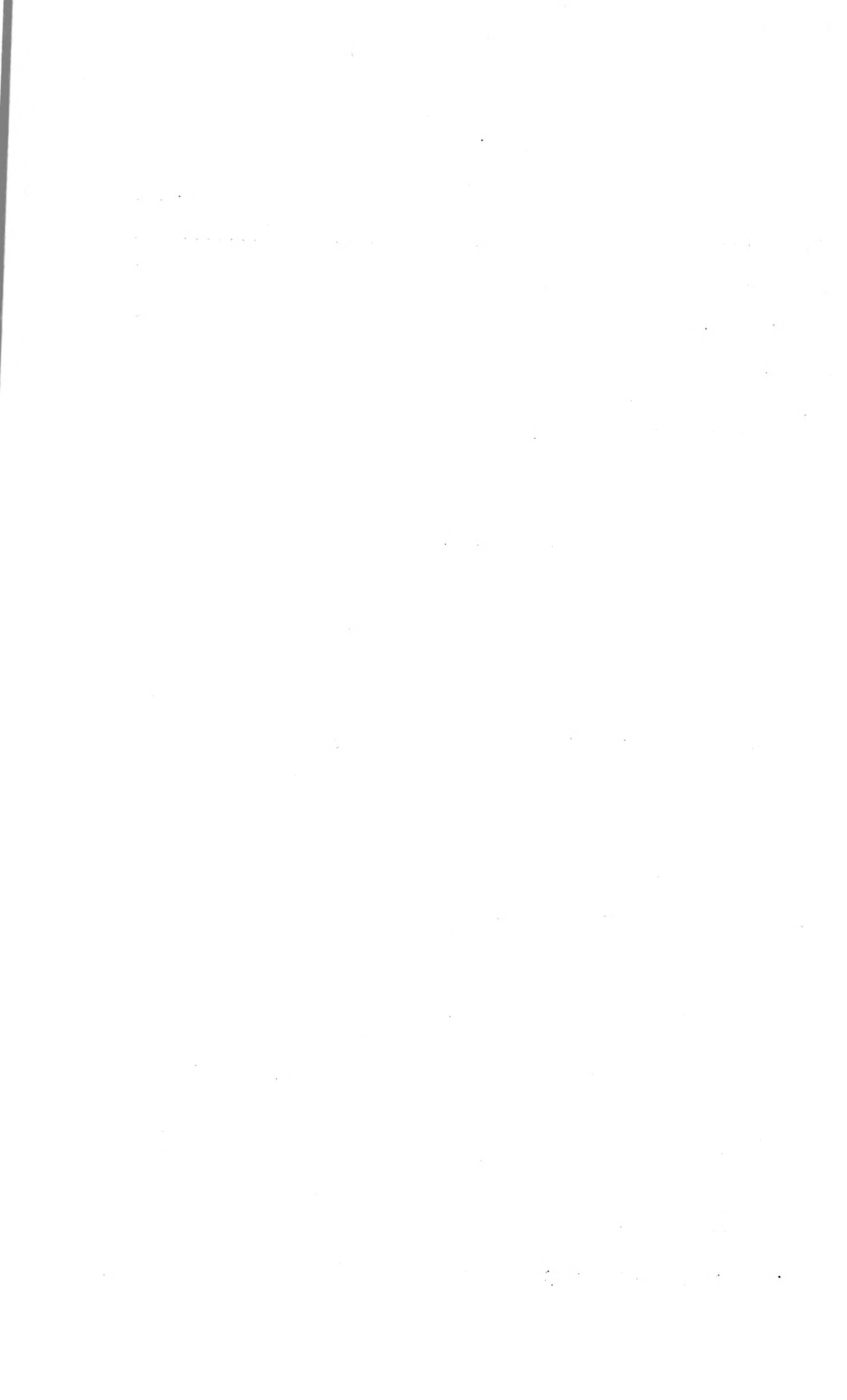
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No. 10,525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

The trial court had jurisdiction under two indictments charging violations of Section 174, Title 21, U. S. C. A., in various counts.

This court has jurisdiction under Section 128 (A) of the Judicial Code as amended by the Act of February 15, 1925. (28 U. S. C. A. Sec. 225.)

STATEMENT OF CASE.

Chan Chaun, the appellant, was indicted by the grand jury for the Northern District of California, Southern Division, on the 3rd day of February, 1943. He was also indicted by the grand jury for the North-

ern District of California, Northern Division, on the 22nd day of March, 1943.

The indictment returned in the Northern Division was consolidated for trial with the indictment returned in the Southern Division.

The indictment returned in the Northern Division charged the defendant in one count with having unlawfully, knowingly, fraudulently and feloniously concealed and facilitated the concealment of 80 ounces of smoking opium.

The indictment in the Southern Division charged the defendant in four separate counts with violations of Section 174, Title 21, U. S. C. A., having to do with the concealment of opium and yen shee. Counts one and two of the indictment returned in the Southern Division were dismissed prior to the trial.

The subject matter of both the indictment in the Northern Division and in the Southern Division were the same. The facts out of which the alleged violation arose was the transportation of the narcotics in question through the Northern Division and into the Southern Division of the District.

The indictment returned in the Northern Division specifically charged that the defendant, on the 1st day of December, 1942, at Davis Junction in the County of Yolo, within the Northern Division, unlawfully, knowingly, fraudulently and feloniously concealed and facilitated the concealment of a certain derivative and preparation of opium, namely, smoking opium, in quantity particularly described

as approximately 80 ounces of smoking opium contained in 12 five-tael brass cans in a suit case in a bus of the Pacific Greyhound Bus Company, which opium had been imported contrary to law.

The indictment returned in the Southern Division charged that the defendant, in the third count, did conceal and facilitated the concealment of a lot of smoking opium, in quantity particularly described as three jars containing approximately one ounce and 180 grains of smoking opium, which had been imported contrary to law, and, in the fourth count with having concealed and facilitated the concealment of a certain quantity of a derivative of smoking opium, namely, a lot of yen shee in quantity particularly described as 220 grains of yen shee, which had been imported contrary to law.

To the two indictments in question the defendant entered a plea of not guilty.

The appellant was convicted by a verdict of a jury on August 5, 1943. The appellant was found guilty on counts three and four of the indictment returned in the Southern Division and was found guilty of the offense charged in the indictment returned in the Northern Division. (Tr. R. pp. 7, 83.)

The appellant was sentenced by the trial court as follows:

On counts three and four of the indictment returned in the Southern Division, the appellant was sentenced to serve a year and a day in a United States penitentiary and pay a fine of \$100.00 on each

count, said terms of imprisonment to run concurrently, and the sentence on said indictment to run concurrently with the sentence imposed on the indictment returned in the Northern Division, and that defendant be further imprisoned for the payment of the fine, or otherwise discharged as by law provided.

On the indictment returned in the Northern Division, on which the defendant was convicted, he was sentenced to a term of two years in a United States penitentiary to be designated by the Attorney General and to pay a fine in the sum of \$500.00 and be further imprisoned for the payment of said fine until otherwise discharged, as provided by law.

The defendant was sentenced to serve a total term of two years in a penitentiary and to pay a total fine in the sum of \$700.00. (Tr. R. pp. 13, 14, 15, 86, 87, 88.)

Appellant moved the trial court for a directed verdict of not guilty at the conclusion of the Government's case, which motion was denied. (Tr. R. pp. 58, 59, 60, 61, 62, 63, 64.)

Appellant moved the trial court for a new trial upon various grounds, amongst which were that the evidence was insufficient, as a matter of law, to sustain the verdict and that the trial court should have directed a verdict of not guilty. (Tr. R. pp. 11, 12, 85, 86.)

Appellant moved the court in arrest of judgment upon various grounds, including that the evidence

was insufficient to support the verdicts and that the evidence was contrary to law as to each of the counts upon which appellant was convicted. (Tr. R. pp. 10, 11, 84, 85.)

The assignment of errors of appellant was filed within the time set by the trial court. (Tr. R. pp. 76, 77, 78.) The bill of exceptions was settled and allowed by the trial court within the time fixed by the trial court and as enlarged by the order of this court. (Tr. R. pp. 20, 78, 79.)

A SUMMARY OF THE EVIDENCE.

On the 1st day of December, 1942, agents of the Narcotic Bureau of the Department of Internal Revenue had the Greyhound Bus Depot at Davis, California under observation. They discovered in the baggage compartment of a bus a suitcase containing 12 brass five tael tins of smoking opium. They removed the opium from the suitcase and then had the suitcase brought by the Greyhound Bus to its destination, the Pacific Greyhound Bus Depot on Fifth and Mission Streets in the City and County of San Francisco. The suitcase was placed in the baggage department at the Greyhound Bus Depot. The narcotic agents kept the suitcase in the baggage room of the depot under observation and on the morning of December 9th Timothy Leong called at the bus depot and presented a check tag calling for the delivery of the suitcase the narcotic agents had been holding un-

der their observation. Thereafter, under the direction of the narcotic agents, Timothy Leong, who was a truck driver, delivered the suitcase to the Hing Wah Tai Company located at 717 Grant Avenue in San Francisco. There the narcotic agents observed the delivery of the suitcase to the premises at 717 Grant Avenue. They entered the premises after the delivery of the suitcase and, according to their testimony, after a thorough search and investigation of the premises found therein three jars containing one ounce and 184 grains of smoking opium and a quantity of yen shee. At the time the agents searched the premises at 717 Grant Avenue they found a number of Chinese persons, amongst whom was the appellant, Chan Chaun.

The appellant, Chan Chaun, was indicted by the Grand Jury at Sacramento and charged with the illegal concealment of the 12 five tael tins of opium removed from the Greyhound bus at Davis Junction. He was also indicted in San Francisco for the concealment of the opium and yen shee, alleged to have been found by the officers at 717 Grant Avenue.

The Government chemist identified the various objects found on the bus and at the premises at 717 Grant Avenue as opium and yen shee.

Dwyer H. Skemp, an inspector for the State Department of Agriculture, testified that while inspecting the baggage compartment of the Greyhound bus at Davis on December 1st at about 8:30 A. M. he found therein a black suitcase containing the 12 five tael tins of opium. The opium was in a bag that

contained an Oregon newspaper and a Chinese newspaper. There was attached to the suitcase a baggage tag numbered 9-37-21.

Timothy Leong, a truck driver for the Canton Express Company, testified that on the 9th of December he went to the Pacific Greyhound Bus Depot at San Francisco for the purpose of presenting a claims check and picking up whatever the claims check called for, but upon arriving at the bus depot he presented the claims check and thereupon he was interviewed by the Federal Narcotic Agents and searched. Thereafter he was taken to the Federal Building and questioned. There he saw the suitcase in question. Thereafter, in company with the narcotic agents, he went to 717 Grant Avenue and delivered the suitcase. The baggage check that he presented to the Pacific Greyhound Bus Company people was one he had received from his boss. He was employed by the Canton Express Company. He delivered the suitcase to the Hing Wah Tai Company at 717 Grant Avenue.

Frank Dun testified that he was the owner of the Canton Express Company and that Timothy Leong was one of his drivers; that on the 9th of December he directed Leong to pick up a piece of baggage from the Pacific Greyhound Bus Depot and gave him a baggage tag for that purpose. He identified the tag as one that had been given him by Pon Wai, who was one of the partners of the Hing Wai Tai Company.

Pon Wai testified that he was shipper and receiver for the Hing Wai Tai Company, which company was in the importing and exporting business. That on De-

cember 9, 1942 he delivered to Dun of the Canton Express Company the baggage check and directed Dun to pick up the baggage called for by the check and bring it to the Hing Wai Tai Company. The baggage that was brought to the Hing Wai Tai Company was a black suitcase. He testified that Mr. Chaun, the appellant, told him to take the baggage check down to the express company and pick up the baggage. He said he was one of the owners of the Hing Wai Tai Company; that there were six or seven owners, including himself and Chan Chaun; that the company employed one or two other people; that he remembered testifying before the United States Commissioner at the preliminary hearing of Chan Chaun, the appellant, at which time he stated he did not know who put the tag on the desk at the Hing Wai Tai Company, but at the time Chan Chaun told him to have the baggage picked up some strangers, whom the witness did not know, were standing by.

Leonard G. Titus, testified that he was an employee of the Pacific Greyhound Bus Company, and that he was in charge of the baggage department at the depot. From his records he identified the baggage check as one belonging to his company and that the records disclosed that the baggage was checked at Portland on November 20, 1942 at the Union Terminal. He further testified that when baggage is checked, each piece must conform to the number of the tag and that a separate tag is given for each piece. He testified that you could not check baggage on a Pacific Greyhound bus without being a passenger and that you

must present a ticket at the time of checking the baggage.

Thomas C. McGuire testified that he was a federal narcotic agent and that on the 9th of December, 1942, at about 9:30 in the morning, he, with another narcotic inspector, went to the Pacific Greyhound Depot in San Francisco and witnessed the arrival of Timothy Leong and the presentation by him of the baggage tag and the subsequent delivery by Leong of the suitcase at 717 Grant Avenue. That he, in company with other narcotic agents and police officers, entered the premises at 717 Grant Avenue; while there he refused exit to Chinese customers who were in the premises; that while there he spoke to Pon Wai; that thereafter Pon Wai went upstairs to the fourth floor with Inspector Manion of the San Francisco Police Department; that Narcotic Supervisor, Manning, and Inspector Manion, in the presence of the witness, questioned Pon Wai; that thereafter Pon Wai was taken before appellant, Chan Chaun, while Chan Chaun was being questioned in a small cubbyhole on the top floor of the building; that he, the witness, heard Pon Wai state he had received the express tag from the appellant; that upon receiving instructions from Manning he remained with Pon Wai some twenty or twenty-five feet from where appellant was and he observed the elevator in motion; that he walked in the direction of the elevator and observed a home made shelf arrangement from which he removed three white porcelain jars, which he said were of the type used to contain opium; that these jars had been

freshly washed and were in clear view; that he observed another jar on the lower shelf which contained traces which appeared to be opium; that he took these jars to his superior, Major Manning and thereafter continued his search and found implements used for pipe smoking yen shee in proximity to where he found the freshly washed jars. He said that he saw yen shee in the possession of Inspector Connolly, which he believed had been found on the premises. He said they also found a number of opium pipes that were concealed in different places. He testified that a cook, Pon Jeung, was later questioned on the premises in the presence of the officers and the appellant and at that time the cook said that the opium had not belonged to him but that it belonged to the appellant. He further testified that later both the cook, Pon Jeung, and the appellant, Chan Chaun, were arrested.

John Connolly testified that he was a police officer of the San Francisco Police Department. That on December 9, 1942, he was present at the premises of the Hing Wai Tai Company at 717 Grant Avenue and that he went there accompanied by the other officers and was instructed by his superior, Inspector Manion, to go to the top floor; that he started a search and in the kitchen in the rear on the top floor Agent McGuire found jars of opium and opium pipes, which the witness identified.

John J. Manion testified that he was an inspector in the San Francisco Police Department in charge of the Chinatown Squad; that on December 9, 1942,

he went to the premises at 717 Grant Avenue and that Supervising Agent Manning and he went to the top floor of the building and there had a conversation with the appellant, Chan Chaun; that the appellant, Chan Chaun, was advised by Major Manning when he came into the small room he occupied that he was under arrest. He testified that the room contained clothes, bed, table and considerable Chinese reading material and books. He said there were several conversations with appellant on that day and that some of the officers who were present were outside the room door; that Pon Wai was brought before the appellant; that he, the witness, knew Pon Wai was a partner and that appellant was a partner in the establishment; that at the time Pon Wai was in the presence of the appellant he said the appellant had given him the tag to give to the express man and that at that time the appellant said that he, the appellant, had gotten the tag from a man by the name of Wong in the Bing Tong Building; that appellant said that at the time he did not know where Wong lived. There were further conversations. Pon Jeung's attention was called to the opium pipes and bowls that were found in the kitchen part of the loft and Pon Jeung said they belonged to the appellant and were not his, but appellant neither denied nor affirmed this. Later an interpreter, a Miss Fong, was brought in and there was a further conversation. Appellant was then questioned in English and replied in English. All of the first conversation testified to was in English. Appellant was asked whether he had been out of town

and he said he had been in Vancouver, Seattle and Portland. He said he had stayed at the Portland Hotel in Portland on the 29th of November. The witness described the premises at 717 Grant Avenue as a three story building, the second story of which was sort of a mezzanine floor with two floors above; that the floor had a width of 25 feet and a depth of 50 feet; that the room which appellant occupied was at the front of the building on the Grant Avenue frontage and that the kitchen he referred to was at the extreme rear; that the room occupied by appellant was partitioned off at the front of the building. He did not recall whether, when appellant was questioned concerning the check, the check was shown to him. He did not recall asking appellant where he got the check, but he did recall that appellant said he got it from a man by the name of Wong. Appellant made this statement after he had been confronted by Pon Wai. Appellant said he had met Wong the day before in the Bing Tong Building. The witness did not recall whether Pon Wai told him that there had been strange men in the place when he got the ticket, nor did he recall that Pon Wai had told him that he found the ticket on the desk.

Joseph A. Manning testified that he was the District Supervisor for the Bureau of Narcotics and that he went to the Hing Wai Tai Company on December 9th. That while there he had several conversations with the defendant, at which Inspector Manion was present and agents Cass and McGuire participated in some of the conversations; that during one of these

conversations Pon Wai was brought into the room occupied by Chan Chaun and there said, in the presence of Chan Chaun, that he had obtained the baggage check in question from Chan Chaun; that at this conversation Chan Chaun claimed that Pon Wai got the check from another man, but Pon Wai insisted that he had gotten it from Chan Chaun. During another conversation at that time Chan Chaun said that he had been in Vancouver, Seattle and Portland and that he was in Portland on November 29th and 30th and had stopped at the Portland Hotel; he denied that he had come down by bus and stated that he returned to San Francisco by train. On one occasion during these conversations Pon Yin Jeung was brought into the room where Chan Chaun had been sleeping and Pon Jeung said the jar he had in his hand and the opium smoking paraphernalia belonged to Chan Chaun; Chan Chaun did not respond to this statement. This was in English, an interpreter not being present. We verified that he had stopped at a hotel in Vancouver but had no record that he had stopped in Portland at the Portland Hotel. This check was made by the Portland office.

C. T. Cass testified that he was a Government narcotic inspector. That on the afternoon of December 1st, at Davis Junction in Yolo County, a bag containing narcotics was turned over to him by the driver of a Pacific Greyhound bus; that that bag had a check on it marked 9-37-21; that he, Cass, removed from the bag 12 brass, five tael tins, containing opium; the tins were wrapped in a copy of Life, a copy of Look,

some Oregon papers and a Chinese newspaper. He, Cass, observed the Greyhound bus depot in San Francisco on December 9th, with other agents, and saw Timothy Leong arrive at the baggage office of the bus station; he later saw Leong deliver the suitcase to 717 Grant Avenue; Leong left the suitcase inside the door of the premises at 717 Grant Avenue; at that time there were several persons in the premises. He, Cass, was present at a conversation between Pon Wai and the defendant, at which time Pon Wai said that he had received the baggage check from Chan Chaun, which Chan Chaun denied, and stated that Pon Wai had gotten the check from another person, but Pon Wai stated: "No, you possibly might have taken it from him, or something like that, but you are the one that gave it to me". Pon Wai said, "No, there was another man there, but you gave me the check". As I recall, Chan Chaun said that a Wong man gave it to him.

Pon Yin Jeung testified that he worked for the Hing Wai Tai Company at 717 Grant Avenue and had worked there for four or five years; he did not speak English; he was present on December 9th at the Hing Wai Tai Company; he denied that he was asked in English whether certain opium which was found there belonged to him and denied that he stated that it belonged to Chan Chaun; that he told the narcotic agents to ask Chan Chaun to whom it belonged.

Lee King, called as a witness by the defendant, testified that he lived at 717 Grant Avenue and was living there on the 9th of December and was a Chi-

nese bookkeeper for the company. He testified that he was one of the owners of the company and occupied a room at 717 Grant Avenue and knew Chan Chaun. He testified that on the 8th day of December he was present when Chan Chaun was talking to a Wong man; this man asked the price of merchandise; this man stated he wanted a piece of baggage brought in and Chan Chaun told him he would have the baggage picked up for him; that he, the witness, did not see the baggage tag put down. He testified that when a customer asks that baggage be picked up, it was the practice of the company to do this as an accommodation. He further testified that he took his meals at 717 Grant Avenue and several other people did. He further testified that Chan Chaun, the cook, the porter and himself lived there and had access to the kitchen. He further testified that the company was engaged in the exporting and importing of Chinese goods.

Pon Yin Jeung testified, as a witness for the defendant, that he was the cook at 717 Grant Avenue and that several of the people employed there had access to and used the kitchen; he said that himself, Chan Chaun, Lee King and Mah Hoy lived at 717 Grant Avenue.

Pon Wai testified, on behalf of the defendant, that he did not live at 717 Grant Avenue, but he took his meals there and that he had occasion to go into the kitchen located on the fourth floor on many occasions.

Chan Chaun testified, as a witness on his own behalf, that he was fifty-five years of age, married and

the father of three children; that he was a member of the firm of Hing Wai Tai Company and had been such for four years; that he lived at 717 Grant Avenue; that he had occasion to go to Vancouver on November 30th and on his way stopped at Portland. He testified that he left San Francisco October 29th and that his first stop was in Portland. (The witness mentioned the date he was in Portland as being November 30th and October 30th.) That he left San Francisco the night before and the next day arrived in Portland where he stayed one day; that while there he visited some of his customers; that he then went to Seattle where he stayed three or four days and visited his trade; that while in Seattle he visited the Chinese consul for the purpose of arranging his visit to Vancouver; that he received from the Chinese consul at Seattle a letter dated November 2, 1942, which letter he took with him to Vancouver and which letter was admitted in evidence; that he was in Vancouver on either the 3rd or 4th of November and that his purpose for going there was to purchase goods; that while there he dealt with a customs broker whose name he did not remember; that this customs broker had been recommended to him by Mr. Hooper, a customs broker in San Francisco. He stated that he was not in Portland on November 30th. He denied that Government's Exhibit No. 7, the suitcase in question, was his; he denied that he checked Government's Exhibit No. 7, the suitcase, in Portland and denied that he had ever seen it before. He stated that on December 7th he saw the bag that Major Manning brought to 717 Grant Avenue. He stated that

a baggage check was given to him by a customer by the name of Wong Jock Mong, who asked him to have the baggage picked up for him as an accommodation; that Wong left the check on the desk and that he, Chan Chaun, told Pon Wai to have the baggage picked up; that he was not told, nor did he know what the suitcase contained. He was just requested to have it picked up. He had met Wong the night before at the Ting Hong Tong and he, Wong, had told him that he, Wong, had come from Portland to buy goods. He testified that he, Chan Chaun, and Wong were both members of the same Tong. He denied that Government's Exhibits 1, 2 and 3 were his or that he had ever had them in his possession, or had ever seen them in the kitchen at 717 Grant Avenue, or any other place. He also made this same denial with respect to Exhibits 4, 5 and 10, which exhibits constituted the opium pipes, scales and jars. He also denied he had ever seen the 12 brass tins containing opium that were seized on the bus at Davis. He admitted that he had been in San Quentin on a charge of opium smoking.

The above summary of the evidence is somewhat lengthy but we believe necessarily so, because of the fact that the sole question on this appeal is the sufficiency of the evidence to sustain the verdict.

SPECIFICATIONS OF ERRORS RELIED UPON.**THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AND IN OVERRULING HIS MOTION IN ARREST OF JUDGMENT.**

The assignment of errors contained in assignments I and III may be treated under one heading, since they both relate to the sufficiency of the evidence to sustain the verdict and to the question of whether or not, as a matter of law, the trial court should have directed the jury to return a verdict of not guilty on both indictments. The same question is involved with respect to the overruling by the court of appellant's motion in arrest of judgment, challenging the sufficiency of the evidence to support the verdict.

We believe that the entire evidence upon which the Government must rely to sustain the conviction of appellant may be summed up as follows:

(A) The delivery of the baggage check by appellant to a member of the Hing Wai Tai Company for the purpose of having the baggage represented by said check picked up;

(B) The finding of yen shee and smoking paraphernalia in the premises at 717 Grant Avenue, which were jointly occupied by several persons, including appellant.

The indictment returned in the Northern Division of the Northern District charged a violation of the Jones-Miller Act with respect to the 12 tins of opium found on the Greyhound bus at Davis, California.

The indictment returned in the Southern Division of the Northern District charged in two counts the possession of smoking opium and yen shee at the

premises known as 717 Grant Avenue, San Francisco, California.

There is no evidence in any manner, shape or form connecting appellant with the 12 tins of opium found on the Greyhound bus at Davis, except the delivery by appellant several days after the finding of this opium, of a baggage check to the witness Pon Wai.

There is a total lack of evidence to connect appellant with the possession of the smoking opium and yen shee found at 717 Grant Avenue and the subject matter of the indictment returned in the Southern Division of the Northern District, except the fact that it was found in a place to which appellant and several other Chinese had access and an alleged accusation by the cook, Pon Yin Jeung, at the time of the arrest of appellant and Pon Yin Jeung, that the opium belonged to appellant, which accusation was denied on the witness stand by Pon Yin Jeung, who was called as a Government witness.

The evidence with respect to both indictments attempting to connect appellant with the offenses charged against him consists solely of suspicious circumstances indicating that appellant had the opportunity to have possession of the narcotics charged in both indictments.

The evidence viewed in its entirety and in a light most favorable to the prosecution is as consistent with the innocence of appellant as with his guilt and under such circumstances the verdict should have been directed in favor of appellant.

McClintock v. U. S., 60 Fed. (2d) 839.

In the case of *Ching Wan v. United States*, 35 Fed. (2d) 665 (Ninth Circuit), the appellant, Ching Wan, was shown to have transported, with the help of another person, a box containing opium to an express company for the purpose of having said box put in transit for delivery to another person. In that case this Circuit reversed the conviction of Ching Wan and held the evidence insufficient to sustain his conviction, because there was a lack of evidence to show any knowledge on the part of Ching Wan of the contents of the package.

We submit that as far as the facts are concerned, the evidence attempting to connect the appellant in this case with the contents of the suitcase represented by the baggage check is not as strong as the evidence in the *Ching Wan* case and there is an entire lack of evidence showing knowledge on the part of the appellant of the contents of said suitcase or in any manner connecting him with the suitcase or its contents.

The facts surrounding the presence of opium and yen shee at the premises known as 717 Grant Avenue in San Francisco are as consistent with the innocence of appellant as with his guilt. An examination of the record will show that the premises in question was a Chinese importing and exporting concern; that several persons lived there and had their meals there; that the place where the alleged opium and yen shee were found was accessible to all of the persons living and eating on the premises; that they were no more accessible to appellant than they were to any one of several others who had free and open access to the premises.

The only scintilla of evidence tending to connect appellant with possession of the opium and yen shee at 717 Grant Avenue is the alleged statement by the Chinese cook to the officers, that the opium and yen shee belonged to the appellant. This statement was testified to by the officers and is alleged to have occurred on the day of the arrest. In this connection it should be noted that the officers arrested both the appellant and the Chinese cook for possession of opium and yen shee. The Chinese cook was not made a party to this prosecution and on the trial the Chinese cook was called as a Government witness and denied, under oath, having made the statement attributed to him by the narcotic agents. Thus, we have a situation where the only evidence connecting appellant with the crime charged in the two counts of the San Francisco indictment is an alleged statement made by a third party at the time of the arrest of appellant, which alleged statement such third party denied under oath when called as a Government witness.

Where facts proven are as consistent with innocence as they are with guilt, the trial court should direct a verdict of not guilty.

Romano v. United States, 9 Fed. (2d) 522;

Parnell v. United States, 64 Fed. (2d) 324.

In *Hammond v. United States*, 127 Fed. (2d) 752, the court held that *unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt*, it is the trial judge's duty to instruct the jury to acquit, and where all substantial evidence is as con-

sistent with innocence as with guilt, it is the duty of the Appellate Court to reverse the judgment of conviction.

The appellant raised the question of the sufficiency of the evidence by his motion for a directed verdict and by his motion in arrest of judgment.

United States v. Fullerton, Fed. Case No. 15,176, 6 Blantf 177.

Also:

Jehl v. United States, 127 Fed. (2d) 585.

All of the acts of appellant, in and of themselves, are innocent acts and there is a complete lack of evidence to show any conduct on behalf of appellant with respect to either of the indictments which is not consistent with his innocence.

CONCLUSION.

We respectfully submit:

1. The evidence is wholly insufficient to support appellant's conviction on the third and fourth count of the indictment returned in the Southern Division of the Northern District;
2. The evidence is wholly insufficient to support appellant's conviction of the indictment returned in the Northern Division of the Northern District;
3. All of the conduct and acts of appellant, in each case, are as consistent with his innocence as with his guilt;

4. The judgment of conviction should be reversed as to all counts.

Dated, San Francisco, California,
March 27, 1944.

Respectfully submitted,
WALTER H. DUANE,
JAMES B. O'CONNOR,
Attorneys for Appellant.

No. 10,525

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHAN CHAUN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

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FILED

MAY 22 1944

PAUL P. O'BRIEN,
CLERK

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No. 10,525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHAN CHAUN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgments of conviction (Tr. 13-15 and 86-87) of the District Court of the United States for the Northern District of California, Southern Division, convicting the appellant on two indictments (Tr. 2-5 and 81) charging him with a violation of Section 174 of Title 21 United States Code in that he concealed and facilitated the concealment of certain opium and yen shee. After a plea of not guilty a jury trial was had and the appellant was convicted.

The Court below had jurisdiction of this case under and pursuant to the provisions of Title 21, United States Code, Section 174. The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, United States Code, Section 225, subdivision (a).

STATEMENT OF CASE.

Appellant's statement of the case is substantially correct and, rather than burden the Court, we will accept it as ours, with one correction. Appellant, evidently inadvertently, makes the following statement (Appellant's Opening Brief, p. 2, paragraph 4) :

“The subject matter of both the indictment in the Northern Division and in the Southern Division were the same. The facts out of which the alleged violation arose was the transportation of the narcotics in question through the Northern Division and into the Southern Division of the District.”

An examination of the indictments and of the Transcript of Record clearly shows this statement to be incorrect.

The indictment returned in the Northern Division charged that the defendant, on the 1st day of December, 1942, at Davis Junction in the County of Yolo, within the Northern Division, concealed and facilitated the concealment of 80 ounces of smoking opium contained in 12 five-tael brass cans.

The indictment returned in the Southern Division charged that the defendant concealed and facilitated the concealment of one ounce and 180 grains of smoking opium and 220 grains of yen shee on the 9th day of December, 1942, at San Francisco, within the Southern Division.

It is apparent that the “subject matter” of these two indictments could not be “the same”, inasmuch as the acts charged occurred on different dates and

in different places. The opium or the residue thereof could not be the same, as the opium involved in the transaction at Davis Junction did not come into the hands of the appellant at San Francisco.

QUESTION.

There is only one question raised by this appeal.

Is the evidence sufficient to sustain the verdict of the jury?

A SUMMARY OF THE EVIDENCE.

Appellant's summary of the evidence is necessarily quite lengthy and substantially correct except that certain evidence favorable to the appellee has been minimized. Rather than burden the Court with another summary equally lengthy, we take the liberty merely to comment upon that of the appellant, by calling attention to and emphasizing the evidence which, we feel, aids in sustaining the verdict.

Dwyer H. Skemp testified that the Greyhound Bus upon which he found the suitcase containing the narcotics had arrived in California from Portland, Oregon. He positively identified the bag which was introduced into evidence as the bag which he had examined and which had contained the opium.

C. T. Cass identified the suitcase which was introduced into evidence as the suitcase which he had examined at Davis Junction and in which he found

the 12 tins of opium. He also identified the tins which were removed from the suitcase as being the tins of opium which he had delivered to the United States chemist and which were introduced into evidence. Further, that he accompanied the expressman who delivered the suitcase to 717 Grant Avenue and that in the presence of the defendant Mr. Pon Wai, pointing to the defendant, said "that is the man that gave me check 9-37-21." Also that check 9-37-21 was the number of the check which was attached to the suitcase at all times.

Timothy Leong testified that the check which he took to the Greyhound Depot had been given to him by his boss, Frank Dun and that there was attached to it a tag reading "H. W. Tai" which means Hing Wah Tai Co. the place where he delivered the suitcase.

Pon Wai testified that it was the appellant, Chan Chaun, who told him to take the check and pick up the suitcase.

Frank Dun testified that the baggage check which he received was given to him by Pon Wai.

Leonard G. Titus testified that the baggage check which was introduced into evidence was the check which was presented to him by Timothy Leong. Also that a person might check baggage on a bus and not actually be a passenger on the bus so long as he had a passenger ticket.

Thomas C. McGuire testified that both Chan Chaun and Pon Jeung were questioned in his presence at 717 Grant Avenue and at that time they both spoke

in English. Also that in his presence, and in the presence of the appellant, Pon Jeung stated that the opium and yen shee found on the premises belonged to the appellant.

John Connolly testified that he has been a member of the Chinatown Squad of the San Francisco Police Department for several years and that he is familiar with the premises located at 717 Grant Avenue; that the only persons to his knowledge who lived on the premises were Pon Jeung and Chan Chaun, the appellant.

John J. Manion testified that he has been in charge of the Chinatown Squad of the San Francisco Police Department for the past twenty-two years. Also that he had several conversations with the appellant on the day in question and that all of these conversations except one were in English. Also that he had a conversation with Pon Jeung in English.

Joseph A. Manning testified that he had conversations with the appellant and Pon Jeung in English. Also that, when Pon Wai confronted the appellant Pon Wai insisted that he had received the baggage check from the appellant.

Pon Yin Jeung testified by the use of an interpreter and denied that he spoke English.

Chan Chaun, the appellant, testified by the use of an interpreter and denied that he spoke English. He testified that he had never seen the man known as Wong before he gave him the baggage check and that he has not seen him since.

ARGUMENT.

There can be no question that the suitcase containing the opium can be traced back to the appellant by an unbroken chain of circumstances. Pon Wai testified he received the check from the appellant and gave it to Frank Dun, the manager of the Canton Express Co.; Frank Dun stated that he gave the check to his employee, Timothy Leong; Leong stated he claimed the suitcase by means of the check from the Greyhound Bus Depot. This evidence stands uncontradicted. In fact, the appellant admits that he gave the check to Pon Wai but attempts to explain his possession of it by some vague story of having received it from a man by the name of Wong—a man whom he had never seen before and has not seen since. By his own admission, this man is a complete stranger to the appellant, he cannot identify him, he came to him unrecommended, he was not introduced by any mutual acquaintance—he is merely an unknown man, whom he met on one occasion at the Bing Tong Building on Waverly Place.

Appellant argues that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the jury to acquit. We admit that this is the general rule, but only when the defendant, himself, does not offer an hypothesis in explanation of the facts adduced against him. If the defendant elects to remain silent, then the Government must prove a case which excludes every reasonable hypothesis except that of guilt. On the other hand, when the defendant takes the witness stand and offers an explanation of his conduct, the

judge or jury need not weigh the Government's case against *any* reasonable hypothesis but must weigh the case presented by the Government against the explanation offered by the defendant.

Ferris v. United States, 40 Fed. (2d) 837;

Chass v. United States, 258 Fed. 911, 914;

Rosengarten v. United States, 32 Fed. (2d) 644.

In the case at bar, the Government placed the defendant in the Northwest at a time when he could easily have checked the suitcase full of opium. In this connection, we respectfully call the Court's attention to the appellant's testimony concerning the dates of his presence in Portland, Oregon (Tr. p. 68), and the evasive manner in which he first stated he was in Portland on November 30, and then, only after suggestion by his counsel, changed the date to October 30. Then the Government, by uncontradicted testimony and by the appellant's own admission connected him up with the claiming of the suitcase at San Francisco by means of the baggage check.

As opposed to this, the appellant offers no better explanation than that he received the check from an unknown man, whom he had not seen before nor since, whom we cannot identify and who disappeared from the scene as silently as he came in. He offers no explanation as to why a perfect stranger would trust him with a baggage check to a suitcase containing \$33,000.00 worth of opium (Tr. p. 58); he had no arrangement with the stranger for the delivery of the bag once he had received it; he had no idea where he could find the stranger to deliver the bag if he had been successful in obtaining it.

Furthermore, we cannot separate the two episodes covered by the two indictments. The one lends weight to the other. In the one case we have a man indisputably connected with a shipment of opium from Portland, Oregon to San Francisco. In the second case when the bag is delivered to his place of residence we find opium, yen shee and opium smoking apparatus in close proximity to the room in which he lives. The fourth floor of 717 Grant Avenue is an open loft; on one side is a small room occupied by the appellant and on the other, an open kitchen where the cook Pon Jeung is employed. Opium and yen shee is found concealed in the kitchen. The appellant is confronted with the cook and the cook flatly states that the opium and the yen shee belong to the appellant. Most important of all, when so confronted and so accused, the appellant stands silent; he does not deny the cook's damaging accusation.

These two transactions cannot be separated. Clearly the evidence was sufficient to warrant a decision by the jury. In this connection we invite the Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Glasser v. United States, 115 U. S. 60, 81.

The case of *Ching Wan v. United States*, 35 Fed. (2d) 665, relied on by appellant, can be easily distinguished from the case at bar. Appellant, inadvertently, asserts that the judgment as to the defendant Ching Wan was reversed. This is not so. In that

case, a co-defendant, who had merely driven an automobile in which the defendant transported a box containing narcotics was convicted of facilitating the transportation of narcotics. The Circuit Court properly reversed his conviction for insufficiency of evidence because it was not shown that he was more than a mere "conduit" and there was no evidence of guilty knowledge on his part.

Here the case is entirely different. The appellant was shown to have had at least constructive possession of the narcotics. He was in a position to have shipped it and, if the agents had not intervened, would have had actual possession of the narcotics upon delivery at 717 Grant Avenue. The Statute itself (21 U.S.C. 174) places the burden upon him to explain his possession to the satisfaction of the jury.

Finally, we come to a most compelling argument and that is the one based on the credibility of witnesses. The rule is so general as to be accepted without the necessity of citation, that the jury is the sole judge of the credibility of witnesses and that the Appellate Court will not reverse their finding merely because had they been sitting as jurors, they might have decided differently.

In the case at bar, several witnesses, notably Inspector Manion, District Supervisor Manning, Agents Cass and McGuire, testified to several conversations had with the appellant and the witness Pon Jeung in *English* at 717 Grant Avenue. Yet both of these witnesses took the stand and denied that they spoke

English and had to be examined by the use of an interpreter. Inspector Manion testified that he had been in charge of the Chinatown Squad of the San Francisco Police Department for twenty-two years, the other witnesses are quite familiar with the Chinese, yet both the appellant and Pon Jeung flatly denied ever having conversed with them in English.

The familiar rule may be here invoked that if the jury distrusts the witness' testimony in any particular they are at liberty to reject all of his testimony.

Furthermore, a witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of other witnesses.

In re Leslie, 119 Fed. 406, 408.

Finally, may we respectfully call the Court's attention to something which cannot, as a matter of mere reporting, appear in the record but which, nevertheless, aided the jury in coming to their verdict. That is, that on more than one occasion the witnesses who claimed they could not speak English answered Government Counsel's question by motions of the head before the interpreter even interpreted the questions, clearly indicating that the witnesses were not telling the truth when they stated they could not speak English and had merely adopted this subterfuge to evade the seriousness of their admissions.

CONCLUSION.

For the reasons stated we respectfully submit that the Court below did not err in denying appellant's motion for a directed verdict and that the evidence amply supports the verdict of the jury.

Dated, San Francisco, California,

May 22, 1944.

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No. 10,525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

JUL 25 1944

PAUL P. O'BRIEN

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No. 10,525

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHAN CHAUN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

APPELLEE'S QUESTION.

Replying to the question raised by the appellee, "Is the evidence sufficient to sustain the verdict of the jury?", appellant will briefly present to the court reasons for reply in the negative.

With a view to avoiding a confusion of the facts, we invite the court's attention first to the evidence offered in support of the indictment returned in the Northern Division of the Northern District of California and upon which a verdict of guilty was returned.

THE INDICTMENT IN THE NORTHERN DIVISION.

On the first day of December, 1942, an inspector of the Department of Agriculture of the State of Cali-

fornia discovered on a Greyhound bus at Hornbrook, California, a suitcase containing some newspapers, magazines and twelve tins containing opium. It is claimed that the suitcase was checked in the baggage room of the Greyhound Bus Depot in Portland. There was a baggage check attached to the suitcase. Federal Narcotic Agents met the bus at Davis, California and removed the twelve tins of opium from the suitcase and returned the suitcase to the bus for delivery to the baggage room of the bus depot in San Francisco.

On December 9, 1942, Timothy Leong, a truck driver, called at the Greyhound Bus Depot and presented a baggage check corresponding in number to that attached to the suitcase, for the purpose of securing the baggage for delivery. He was thereupon confronted by Federal Narcotic Agents, who questioned him relative to the baggage check. Leong said he received the check from his employer, the Canton Express Company, with instructions to deliver the suitcase to the Hing Wah Tai Company at 717 Grant Avenue.

Frank Dun, the proprietor of the Canton Express Company, when questioned, stated he received the check from Pon Wai, one of the partners of the Hing Wah Tai Company, and Pon Wai, also a witness for the Government, testified that he first saw the check on his desk; he does not know who put it there, but the appellant told him to have the baggage represented by the check picked up and at that time there were two or three strangers present. Appellant at all times denied ownership of the baggage and stated he

instructed Pon Wai to have the baggage picked up as an accommodation to one of the strangers, which is not the unusual in his business.

THE INSUFFICIENCY OF EVIDENCE.

Appellant contends: First, there is no proof that appellant ever had possession of the baggage check or the baggage; Secondly, there is no proof that appellant had any knowledge of the contents of the suitcase; Thirdly, there is no proof that appellant concealed or facilitated the concealment of opium.

This court, as well as the courts of other circuits, have held such proof to be indispensable. In *Ching Wan v. United States*, 35 Fed. (2d) 665 (9th Cir.) this court used the following language:

“It was not shown that he had any knowledge of the contents of the box transported by him or of the criminal purposes of the other parties.”

And in *Kalos v. United States*, 9 Fed. (2d) 268 (8th Cir.) the court said:

“Knowledge by defendant that morphine was in the package is an element of the crime, made so by statute. Even without the statutory requirement it would have been necessary to prove that knowledge before the case could be properly submitted to the jury. *Baender v. Barnett*, 255 U.S. 224, 41 S. Ct. 271, 65 L. Ed. 597.”

THE INDICTMENT IN THE SOUTHERN DIVISION.

The appellant was found guilty of the offenses charged in the third and fourth counts of the indictment returned in the Southern Division of the United States District Court, for the Northern District of California, the third count charging the concealment and facilitating the concealment of smoking opium contained in three jars, the quantity of which was one ounce and 184 grains; the fourth count charging concealment of 220 grains of yen shee. The above described narcotics were found in a kitchen on the third floor of the building at 717 Grant Avenue, San Francisco. These are the premises maintained and operated by the Hing Wah Tai Company, engaged in the importing and exporting business.

Inspector John J. Manion, in charge of the Chinatown Squad of the San Francisco Police Department, testified that he is quite familiar with the premises known as 717 Grant Avenue; that it is a three story building with a frontage of approximately 25 feet and a depth of 50 feet; that there is merchandise contained in the various floors of the building and a freight elevator used therein; that at the extreme rear of the building there is a kitchen (Tr. p. 50) and at the front of the building, on the third floor, there is a room which is occupied by the appellant. (Tr. p. 49.)

A Federal narcotic agent discovered certain jars in the kitchen which, while they contained no narcotics, aroused his suspicions and caused him to search and upon a further search a small quantity of opium, as well as yen shee was found in the kitchen.

It appears that the first person questioned with reference to the opium and yen shee found in the kitchen was Pon Yin Jeung, a Chinese cook, whose duties were to prepare the food for all of the persons engaged in the business of the Hin Wah Tai Company on the premises; that Pon Yin Jeung not only performed the duties of his employment in the kitchen, but lived on the premises, as did the appellant, Chan Chaun, Lee King, a bookkeeper, and a Chinese employee by the name of Mah Hoy, the porter. It also appears from the testimony of Pon Yin Jeung that not only the four persons named, but all of the employees of the business had free access to the kitchen, where the opium and yen shee were found. It is contended, however, that Pon Yin Jeung stated, in the presence of the appellant, that the narcotics found in the kitchen belonged to the appellant and that when this statement was made appellant neither admitted, nor denied the accusation.

It will be noted that no opium nor other contraband was found in the premises occupied exclusively by appellant. While it is claimed by the Government witnesses that the cook stated that the opium and yen shee found in the kitchen belonged to appellant, the cook testified that he made no such statement, but simply said to the agents in response to their inquiry as to who owned the opium and yen shee, "ask him", pointing to appellant. Appellee thereupon points out that Pon Yin Jeung is not to be believed, for the reason that other Government witnesses testified that they conversed with the witness in the English lan-

guage without difficulty, but that he, the said Pon Yin Jeung, testified positively that he did not at any time converse with the witnesses in English and could not talk in any language other than Chinese. The appellee in discounting the testimony of Pon Yin Jeung disregards the fact that he is a witness called by the appellee, whose testimony, for what it is worth, was adduced for the purpose of proving appellee's case against appellant. Obviously Pon Yin Jeung, whose duties require his almost constant occupation of the kitchen, wherein the narcotics were found, would not claim ownership of them.

THE EVIDENCE IS WHOLLY INSUFFICIENT.

It is the contention of appellant that the evidence is wholly insufficient to sustain the verdict of guilty for the following reasons:

First: The only evidence offered to support the conviction of the appellant was the alleged accusatory statement of the cook, who was constantly engaged in the kitchen where the narcotics were found.

“Obviously, the out of court accusation made by the Nicholsons was not evidence of the truth of that accusation. When an out of court accusation is made, it is not the accusation, but the conduct of the accused that is evidence, and the accusation is merely admitted to explain the conduct of the accused. Where the accused denies the accusation, the accusation should not be admitted at all, unless admissible on other grounds.” (Citing cases.)

People v. Zoffel, 35 Cal. App. (2d) 215 at 223.

“* * * the testimony of the arresting officer referring to a conversation had with defendant White’s wife was admitted as follows: ‘Q. Did you later have a conversation with her in the presence of the defendant White? A. Yes. Q. And what was said at that time? A. In the presence of the defendant? Q. Yes. A. One of the accompanying officers asked the young lady if she was the defendant White’s wife. She said she was not.’ * * *

“The foregoing will serve as examples. Apparently the trial court was under the impression that the presence of the defendant alters the character as hearsay of the statements and declarations of others. Such is not the rule.

“Manifestly, statements made by others outside the presence of the defendant are clearly hearsay. Statements made by others are no less hearsay when made in the presence of a defendant. The so-called exception to the rule permitting the introduction of evidence of accusatory statements made to the accused may account for the confusion that appears to exist somewhat generally. Evidence of accusatory statements, however, may be received for but one purpose, namely, as the basis for evidence of the conduct of the accused in the face of such accusations. (People v. Shellenberger, 25 Cal. App. (2d) 402 at 408; People v. Teshara, 134 Cal. 542 at 544; People v. Philbon, 138 Cal. 530 at 532; People v. Weber, 149 Cal. 325 at 338; People v. Ah Yute, 54 Cal. 89; People v. Ayhens, 16 Cal. App. 618 at 623.) Although often referred to as an exception to the rule, the foregoing doctrine, it would seem,

emphasizes and confirms the rule and is in entire accord therewith, rather than an exception.”

People v. White, 44 Cal. App. (2d) 183 at p. 185.

To the same effect:

Autrey v. State, 114 So. 244 at 245-6;

Commonwealth v. Karmendi, 195 Atl. 62 at 68.

Second: That approximately seven people are engaged daily on the premises at 717 Grant Avenue, all of whom have free and equal access to the kitchen on the third floor, and no proof was offered of possession by appellant, whether immediate and exclusive, or otherwise.

“The general rule is that possession, to be incriminating must be personal and exclusive.”

Willsman v. U. S., 286 Fed. 852 at 855.

“The court instructed the jury in effect that the burden of proving possession of the narcotics as alleged in the information rested upon the prosecution, and such possession must have been an immediate and exclusive possession and one under the dominion and control of defendant. The instructions given by the court fully and correctly stated the law upon the subject.”

People v. Herbert, 59 Cal. App. 158 at 159;

People v. Sinclair, 129 Cal. App. 320 at 322.

“There is no evidence of ownership or connection with the saloon on the part of Grant or Trinkler. All of the evidence is as consistent with innocence as with guilt, and is not sufficient

to convict these defendants. Any innocent individual might have done all of the things done by Grant and Trinkler. The whole case against these defendants does not rise above suspicion." (Citing other cases and quoting from *Salinger v. U.S.*, 23 Fed. (2d) 48 at 52.)

Grant v. U.S., 49 Fed. (2d) 118-119.

Third: The evidence is as consistent with innocence as with guilt.

"In *Bishop v. United States*, 8 Cir., 16 F. 2d 410, 416, it is said: 'This court has often taken the position that, where the evidence in a case is as consistent with innocence as with guilt, a conviction cannot be sustained. In *Grantello v. United States*, 3 F. 2d 117, 118, this court said: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' ' *Willsman et al. v. United States* (C.C.A.), 286 F. 852; *Sullivan v. United States* (C.C.A.), 283 F. 865; *Edwards v. United States* (C.C.A.), 7 F. 2d 357."

Towbin v. United States, 93 Fed. (2d) 861 at 866;

Gunning v. Cooley, 281 U.S. 90;

Leslie v. United States, 43 Fed. (2d) 288 at 290;

Moore v. United States, 56 Fed. (2d) 794;

Linder v. United States, 268 U.S. 5.

“Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.”

Sullivan v. United States, 283 Fed. 868;

Willsman et al. v. United States, 852 at 856.

And finally:

“In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. ‘Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse the judgment against him.’ (Isbell v. United States, * * * 227 Fed. 788-792.)

“In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape. True enough his intent can only be determined by his acts. But on the facts shown here, the conclusion that he intended rape would be pure conjecture.”

Hammond v. United States, 127 Fed. (2d) 752 at 753.

CONCLUSION.

We respectfully submit that in the light of the foregoing authorities, the judgment of conviction should be reversed as to both indictments, for the reasons hereinabove set forth.

Dated, San Francisco, California,

July 24, 1944.

Respectfully submitted,

WALTER H. DUANE,

JAMES B. O'CONNOR,

Attorneys for Appellant.

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

UNITED STATES OF AMERICA,

Appellant,

vs.

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, LEWIS
L. STEDMAN, Liquidating Trustee of Skinner and Eddy Ship-
building Company, a dissolved corporation, and KING COUNTY,
WASHINGTON, a municipal corporation,

Appellees,

and

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, and
LEWIS L. STEDMAN, Liquidating Trustee of Skinner and
Eddy Shipbuilding Company, a dissolved corporation,

Appellants,

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASHING-
TON, a municipal corporation,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

JAN 19 1944

No. 10573

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, LEWIS
L. STEDMAN, Liquidating Trustee of Skinner and Eddy Ship-
building Company, a dissolved corporation, and KING COUNTY,
WASHINGTON, a municipal corporation,

Appellees,

and

MERCHANTS TRANSFER & STORAGE COMPANY, a corporation,
SKINNER & EDDY CORPORATION, a corporation, and
LEWIS L. STEDMAN, Liquidating Trustee of Skinner and
Eddy Shipbuilding Company, a dissolved corporation,

Appellants,

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASHING-
TON, a municipal corporation,

Appellees.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Western District of Washington,
Northern Division

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of Skinner and Eddy Shipbuilding Co., a
dissolved corporation

1503 Hoge Building
Seattle, 1, Washington [1*]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision

No. 781

UNITED STATES OF AMERICA,

Petitioner,

v.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON;

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation; SKINNER & EDDY
CORPORATION, a corporation; LEWIS L.
STEDMAN, Liquidating Trustee of Skinner
and Eddy Shipbuilding Company, a dissolved
corporation;

KING COUNTY, WASHINGTON, a municipal
corporation;

UNKNOWN OWNERS, being all other persons or
parties unknown having or claiming any right,
title, estate, lien or interest in the real estate
described in the petition herein,

Respondents.

PETITION IN CONDEMNATION

Comes Now the petitioner, United States of
America, by its undersigned attorneys, at the direc-
tion and under the authority of the Attorney Gen-
eral of the United States, pursuant to a request of
the Acting Secretary of War, and represents;

I.

This action is instituted under the authority of the following Acts of Congress:

Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 1, 1943 (Public Law 108—78th Congress.) [2]

II.

It is the opinion of the Acting Secretary of War and he has determined that it is necessary and advantageous to the Government to acquire for the United States by condemnation under judicial process for the storage of military supplies and other military purposes, an estate for a term of years in and to certain real property situate in the County of King, State of Washington, and more particularly described as follows:

Lot 4, Black's Replat of Portions of lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the East line of said Lot 4 and a line parallel

to said produced line and 10 feet West thereof,
And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3 produced North, and the West line of Lot 6 produced North, Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any, of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less.

A map or plat of said real property is hereto attached, marked Exhibit "A" and made a part hereof.

III.

The estate to be acquired is a term of years ending June 30, 1944, extendible for yearly periods thereafter during the existing national emergency

at the election of the United States, [3] notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines.

IV.

The persons and corporations ascertained to be interested in said land are named as respondents in the caption of this petition and made parties hereto. Petitioner also makes parties to this action all persons or parties unknown having or claiming any interest or estate in said land or any portion thereof and petitioner has designated such persons as "Unknown Owners, being all other persons or parties unknown having or claiming any right, title, estate, lien or interest in the real estate described in the petition herein."

V.

The utmost haste in expediting this project is vital to the successful prosecution of the war and the Acting Secretary of War has requested the Attorney General to secure an order of the Court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises.

Wherefore, your petitioner prays this honorable Court:

1. That this condemnation be adjudged to be for the public use.

2. That the Court enter an order granting petitioner the immediate possession and right to occupy said property.

3. That compensation be paid for the appropriation of said estate in said property and that the parties entitled thereto [4] be ascertained and determined.

4. For such other and further relief as to the Court shall seem just and equitable.

F. P. KEENAN

Special Assistant to The At-
torney General

IVAN MERRICK

Special Attorney Department
of Justice

Office and Post Office Address:

655 Skinner Building

Seattle 1, Washington

State of Washington

County of King—ss

Ivan Merrick, being first duly sworn, on oath deposes and says: That he is a Special Attorney, Department of Justice, and one of the attorneys for petitioner. That he has read the foregoing petition, knows the contents thereof and believes the same to be true.

IVAN MERRICK

Subscribed and sworn to before me this 2nd day
of August, 1943.

(Seal)

H. I. KYLE

Notary Public in and for the State of Washington,
residing at Erumclaw.

[Endorsed]: Filed Aug. 2, 1943. [5]

TRACT MAP (WITHOUT GRID)

FD 601.53 MERCHANTS TRANSFER & STORAGE ~~WASHINGTON~~ *Where*Project symbol No. 21 ~~W. Connecticut St., Seattle, Washington~~ Tract No. _____

Lewis L. Stedman, Liquidating trustee of Skinner & Eddy Shipbuilding Company,

Name of owner a dissolved corporation. Hoge Building, Seattle, ~~Washington~~

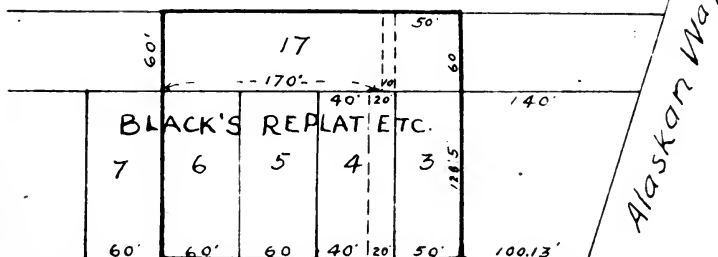
Field work by _____ Date _____

Description of tract _____

SCALE: 1" = 100'

368

SEATTLE TIDE LANDS.



W. Connecticut St.

CLASSES OF LAND

Crop land _____ ☐Pasture land _____ ☐Forest land _____ ☐• _____ ☐

(The grades of each class of land must be shown on the map proper.)

* Name of any other class of land involved.

I certify that this is an accurate map of tract _____

_____ based on _____

_____ City Plat _____ which

shows this tract to contain _____ acres.

_____ Wilber L. Crook

_____ (Name)

_____ Draftsman.

_____ (Title)

_____ (Date)

Indicate whether map is based on General Land Office records, actual survey of tract, or deed to vendor from former owner, or indicate the nature of other information used.

24-22, Form 20, 10 CE 601.53 V.E. Note Tr. 4 Mr. 52642 Exhibit A P. 5

[Title of District Court and Cause.]

MOTION TO DISMISS PURSUANT
TO RULE 12-B

The defendant, the Merchants Transfer & Storage Company, a corporation, moves the court to dismiss the action, because:

(1) The court does not have jurisdiction over the subject matter for the reason that the action is brought pursuant to a request of the Acting Secretary of War. The power delegated by the Act of March 27, 1942 (Public Laws 507, 77th Congress) does not grant the Acting Secretary of War authority to cause condemnation proceedings to be instituted.

(2) The complaint fails to state a claim against the defendant upon which relief can be granted in the following particulars: [7]

(a) The declaration of taking fails to show a legal authority under which the premises may be taken and the public use for which said lands are taken and further fails to state the specific allegations required pursuant to Title 40, Paragraph 258-a, U.S.C.A.

(b) Because the statement of the estate or interest in said lands which it is sought to take is not sufficiently described and set out. The interest is indefinite. It must be for one year but it may be for several years and beyond the term of the lease of this defendant. Each period of taking would be a separate matter and compensation would be fixed as of the date of each taking. The rights

in the property should be specified with certainty. 18 Am. Jur. 969, Para. 325.

(3) For the reason that the property and rights described in the property are already devoted to an essential war industry and public use under the laws of the State of Washington in relation to warehouses and also pursuant to the statement issued by the Office of the Defense Transportation of March 29, 1943, wherein it held in part that storage and warehousing were essential, particularly as it relates to the Nation's Food Supply. The petition fails to show that public necessities can be served by such taking. 18 Am. Jur. 723, Para. 97.

Wherefore Defendant Prays that the whole complaint be dismissed and for such further orders and relief as to the court may seem just.

ROY D. ROBINSON

TRACY E. GRIFFIN

Attorneys for defendant, Merchants Storage & Transfer Co.

[Endorsed]: Filed Aug. 4, 1943. [8]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Rule 52-A

This cause coming on regularly for hearing before the court upon the petition of the United States

of America for the condemnation of certain property and for an order adjudging public use and granting an order for the immediate possession thereof pursuant to eminent domain statutes and the Second War Powers Act for the benefit of the Port of Embarkation; said cause having come on for hearing on the 2nd day of August 1943 and thereafter continued until August 7, 1943; the petitioner being represented by Ivan Merrick and Ernest T. Falk; and the respondent, Merchants Transfer & Storage Company, being represented by Roy D. Robinson and Tracy E. Griffin; and the respondent, Skinner & Eddy Corporation, being represented by Lewis L. Stedman; and testimony and documentary [27] evidence having been introduced on behalf of each of the parties and after argument of counsel, the cause having been submitted to the court and the court having rendered an oral decision herein makes and enters the following as its

FINDINGS OF FACT

I.

That the action was brought by the petitioner pursuant to the request of the Acting Secretary of War. That the respondents have raised a question that this being an action in eminent domain, the statutes must be strictly construed and as the statute does not recognize an Acting Secretary of War, that the petition does not give the court jurisdiction. The Court finds, however, that the Acting

Secretary of War under other statutes is given sufficient authority.

II.

The court further finds that the petition shows that the Acting Secretary of War has determined that it is necessary and advantageous for the Federal Government to condemn under judicial process for the storage of military supplies and for other military purposes an estate for years in said real estate in the petition described.

III.

The court further finds that under the authority of the *United States vs. the State of Montana*, 134 Fed. (2d) 194, the principle of rule or law has been adopted that when a Department of Government through its proper officials, such as the War Department, in good faith determines and finds necessary that the Government acquire by condemnation a certain piece of property owned by a citizen, that such determination is binding upon the court; in other words, the necessity for the taking of specific property and the right to determine what is a public use is in the first instance a legislative question for the Department rather than a judicial [28] question for the court, but the court further finds that where it is charged, as here, by attorneys for respondents, that the officers to whom has been delegated the authority of carrying out the purposes of Congress, has acted capriciously and arbitrarily, that it then becomes the duty of the

court to determine whether the taking is in good faith or is arbitrary and capricious.

IV.

The court further finds that the Government is seeking to take the right to the use of the property described in the petition for different specified terms as set out in Paragraph III of the petition.

V.

The court further finds that the property described in the petition is practically one acre of land lying on the north side of West Connecticut Street between Alaska Way and the water front; that it is improved with a four story frame building, with one-half basement containing over 90,000 square feet of floor space; that the upper floors have a load capacity of 125 pounds to a square *feet*. The building is heated. That it was constructed during the last War; that the respondent, Skinner & Eddy Corporation owns the fee.

VI.

The court further finds that the Merchants Transfer & Storage Company is a corporation organized under the laws of the State of Washington. That under the laws of the State of Washington it has a power of eminent domain. That it is authorized to do business as a public service warehouse; that its rights, powers and duties as such are controlled by the laws of the State of Washington. [29]

VII.

The court further finds that prior to February 4, 1941, the Merchants Transfer & Storage Company occupied a warehouse on Alaska Way about one block from the present location, which contained 65,000 square feet of floor space; that this warehouse, along with the Keystone Warehouse, were taken for the Port of Embarkation under eminent domain proceedings; that these properties were known as the Russell property.

VIII.

That on February 4, 1941, the Merchants Transfer & Storage Company leased the property in the petition described for a period of five years. That one-half of the term has already expired; that shortly after that date and at all times since, it has occupied said premises as a public warehouse, which is classed as an essential war industry. That the company is well equipped to handle the business and is capably managed. That in addition to its other business, it is bonded as a Customs' warehouse and at all times holds under bond a large amount of products for entry through the Customs. That the warehouse is filled to capacity and has approximately 10,500 tons of goods, wares and merchandise stored all of the time. That about 90% of the contents are food products. That a large amount of food products are received each day, usually in carload lots, and are disbursed through the warehouse to the various consumers; the average being 150 tons distributed each day. That the A. & P.

chain grocery stores are one of their large customers. The U. & I. Sugar Co. and various other large producers use the facilities afforded by this warehouse and are actively engaged in distributing food products and supplies to the civilian population and defense workers. That the Merchants Transfer & Storage Co. expended approximately \$12,500 in repairing the building and is reserving 10% of its space for the United States Government.

[30]

IX.

The court further finds that there is no other available space in the City of Seattle, which could be obtained by the Merchants Transfer & Storage Co. or by their larger customers for the distribution of these food products to the civilian population and that they will really suffer in their services of necessary supply if this property is withdrawn from such supply servicing to the public.

X.

The court further finds that subsequent to February 4, 1941, when the Merchants Transfer & Storage Co. acquired its present lease, that the U. S. Port of Embarkation, as shown by exhibits in the cause, has greatly extended its holdings so that it now owns or controls or in the process of obtaining all of the property entirely surrounding the property described in the petition, including practically all of the property between Alaska Way and the water front for a number of blocks and including a large number of warehouses such as

the A. M. Castle property, the Stacy Street Warehouse and the Goodrich warehouse, which is a building about 100 feet East of the property in the petition described and practically the same dimensions, the latter property being only partly occupied. That the U. S. Port of Embarkation has now practically completed a Pier at the end of West Connecticut Street, which is approximately 950 feet long and in excess of 150 feet in width with a large balcony, all of which will afford additional warehouse space.

XI.

The court further finds that a considerable portion of the Russell warehouse building heretofore mentioned and other properties have been converted from warehouse uses to office purposes. [31]

XII.

The court further finds that the United States desires immediate possession of the property at this time principally for the purpose of storing metal pipes, metal pipe fittings, metal ship repair parts and ships' stores. That the nature of the Government property to be stored upon said premises is not such as to indispensably require any particular space now, that it could be just as well cared for out in the open air with practically no depreciation, or under temporary sheds or canvas, and that while it may be convenient to have the space for storing pipes, it has other facilities which will answer its purpose and it has other warehouses

nearby and other space which has been converted to offices instead of warehouse and storage uses, the purpose for which it was acquired.

XIII.

The court further finds from the evidence, that so far as service to the civilian population is concerned, that there is not any other service which is comparable to the service from this warehouse and that this warehouse and storage service is practically indispensable to the public.

XIV.

The court further finds that the policy advanced by the Government for the policing and fire protection of its property is not necessary as the present municipal authorities rendered sufficient service of this kind.

XV.

The court further finds that the action of the United States in relation to obtaining immediate possession of this property has not been in good faith; that it has acted arbitrarily and capriciously and that the taking of immediate possession of this property is not a war time necessity. [32]

XVI.

The court further finds that the only matter now before the court is the application of the United States for immediate possession.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

CONCLUSIONS OF LAW

From the foregoing findings of fact the court concludes as follows:

I.

That the motion of attorneys for respondents to dismiss the action for the reason it is brought at the request of the Acting Secretary of War should be denied.

II.

That while the right to determine what is a public use and when there is a public necessity for taking specific property by the Federal Government in the first instance are to be determined by the Department or person to whom the authority has been delegated by Congress, the question as to whether in carrying out the purpose of Congress, officers have acted capriciously and arbitrarily is a judicial question and the court has so considered it and does hereby conclude that the officers in this case have acted capriciously and arbitrarily and that the taking immediate possession of the property in the petition described is not necessary.

III.

That the application of the Respondents to dismiss the petition for condemnation is not properly

before the court and *and* should not be ruled upon at this time. [33]

IV.

That the application of the United States Government for the immediate possession of the property in the petition described should be denied.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

Presented by:

ROY D. ROBINSON

LEWIS L. STEDMAN

TRACY E. GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Aug. 13, 1943. [34]

[Title of District Court and Cause.]

ORDER DENYING THE NECESSITY OF TAK-
ING AND THE RIGHT TO POSSESSION

This cause coming regularly on for hearing before the court on the 2nd day of August, 1943 and by the court continued to August 7, 1943, for an order authorizing the taking of the property in the petition described by condemnation, together with the right to the immediate possession thereof; the petitioner being represented by the Honorable Ivan Merrick and the Honorable Ernest T. Falk; and the respondents, Merchants Transfer & Storage

Company, being represented by Roy D. Robinson and Tracy E. Griffin; and Skinner & Eddy Corporation being represented by Lewis L. Stedman; and the said cause having heretofore been submitted to [35] the court and oral opinion having been rendered therein and findings of fact and conclusions of law having been heretofore made and entered in this cause and the law and the premises being by the court fully understood and considered.

It Is Hereby Ordered, Adjudged and Decreed that the motion for the entry of an order granting the petitioner the right to the immediate possession of said premises be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion of the respondents to dismiss the petition for condemnation is not properly before the court and the court declines to rule upon this motion.

Petitioner excepts to the entry of this order and Respondents except to the refusal to dismiss the entire petition.

Each exception allowed.

Done In Open Court this 13th day of August, 1943.

JOHN C. BOWEN

Judge

Presented by:

/s/ ROY D. ROBINSON

/s/ LEWIS L. STEDMAN

/s/ TRACY E. GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Aug. 13, 1943. [36]

[Title of District Court and Cause.]

PETITION FOR RULE AND ATTACHMENT
IN RE: CONTEMPT

To the Judges of the District Court of the United States, for the Western District of Washington, Northern Division, Hon. John C. Bowen, Presiding:

Your petitioners respectfully show:

I.

On or about the 2nd day of August, 1943, the "United States of America, by its undersigned attorneys, at the direction and under the authority of the Attorney General of the United States, pursuant to a request of the Acting Secretary of War", filed in this court and cause its "Petition in Condemnation", seeking to condemn properties of petitioners, more particularly in said petition described.

II.

That paragraph V of said Petition did allege as follows:

"The utmost haste in expediting this project is vital to the successful prosecution of the war and the Acting Secretary of War [37] has requested the attorney General to secure an order of the Court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises."

and in pursuance thereof the Petitioner did pray "that the Court enter an order granting petitioner the immediate possession and right to occupy said property."

III.

That, having elected to proceed in said matter in the above entitled court and cause, wherein and whereby said court became possessed of jurisdiction of the parties and of the subject matter, a hearing upon said petition was duly had, testimony taken, evidence adduced, with argument by respective counsel, and on the 13th day of August, 1943, the Honorable John C. Bowen, the duly qualified and acting Judge of the United States District Court for the Western District of Washington, Northern Division, before whom all said proceedings and hearing were had, did, in pursuance of Findings of Fact and Conclusions of Law, duly rendered, made and entered, duly render, make and enter an "Order Denying the Necessity of Taking and the Right to Possession"; that a copy of said order is hereunto attached, marked Exhibit "A", and by reference made a part hereof.

IV.

That paragraphs XV and XVI of the Court's Findings of Fact aforesaid were as follows:

"XV.

"The court further finds that the action of the United States in relation to obtaining immediate possession of this property has not been

in good faith; that it has acted arbitrarily and capriciously and that the taking of immediate possession of this property is not a war time necessity.”

“XVI.

“The court further finds that the only matter now before the Court is the application of the United States for immediate possession.”

V.

That no appeal was or has been taken from the Order and Judgment of this Court aforesaid.

VI.

That at about the hour of 5:50 P. M. on Wednesday, the 8th day of [38] September, 1943, the Petitioner, acting through Sherman B. Green, “Chief, Seattle Sub-Office” of the War Department, Office of Division Engineer, Pacific Division, Seattle Real Estate Field Office, 217 Lloyd Building Seattle, Washington, and through Major S. N. Tidemon, Jr., United States Army, and accompanied by the armed forces of the United States, seized the physical possession of the identical properties in the aforesaid Petition in Condemnation described, ousted the owners from possession thereof, posted notices of occupancy by the United States Army, and placed armed guards of the United States Army in and about said premises.

VII.

That the said Green delivered to petitioners, Merchant Transfer & Storage Company, a corpora-

tion, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, a Notice of Taking Possession, copy of which is hereunto attached and marked Exhibit "B".

VIII.

That the Petitioner in said condemnation proceedings, acting through the War Department, as aforesaid, has taken, retained and is retaining the immediate possession of said premises hereinabove referred to and all in direct and open violation of the aforesaid order of this Court heretofore duly rendered, made and entered herein, and, notwithstanding the election of Petitioner in said condemnation, acting as aforesaid pursuant request of the Acting Secretary of War, has now, through the War Department, forcibly ousted the petitioners herein from their occupancy and use of said premises.

IX.

That the above named Sherman B. Green, Major S. N. Tidemon, Jr., U. S. Army, Honorable Robert P. Patterson, Under Secretary of War, Honorable Henry L. Stimson, Secretary of War, and (also directed against) all persons acting by, through or under them, or any of them, or in concert with them, or any of them, and all other officers, servants and persons acting in concert with or under their orders and direction, and each of them, had, have and at all times herein [39] mentioned had actual

notice of the rendering and entering of the order herein stated denying to the petitioner, United States of America, the right to the immediate possession of said premises, and each of them has wholly failed and neglected to observe and comply with the provisions and requirements of said order and have wrongfully and willfully refused so to do, and have wrongfully and unlawfully violated said order in the manner herein pleaded. That the refusal of the above named persons to obey said order of the court and their forcible and willful taking possession of said premises, as herein pleaded was and is calculated and intended by them, and each of them, to and actually did defeat, impede and impair the order of the court herein pleaded and did and does prejudice the rights and remedies of the respondents in said action, who are the petitioners herein, to the great and irreparable injury and damages to your petitioners herein. That the undersigned, who verify this petition, are duly authorized by the respective corporate entities the respondents above named, who are petitioners herein, to make this application and to take these proceedings for and on their behalf.

X.

That the agents and officers of the original Petitioner in Condemnation, to-wit: Sherman B. Green, Major S. N. Tidemon, Jr., and Honorable Robert P. Patterson, Under Secretary of War but designated in this proceeding as "Acting Secretary of

War", and Honorable Henry L. Stimson, Secretary of War, and all persons acting by, through or under them, or any of them, or under their orders and directions, are in contempt of this court for the willful and deliberate violation of a lawful order, decree and command of this Court herein pleaded.

This Petition is also based on the affidavits of Samuel C. Horner, and Lewis L. Stedman, verified September 10th, 1943, which are attached hereto and made a part of.

Wherefore, your petitioners pray that a Rule and Attachment issue for contempt of each said Green, Tidemon, Patterson and Stimson, and that under the usual process and rules of this Court they be punished accordingly, and that the [40] possession and use of said premises be forthwith restored to petitioners herein.

Dated this 11th day of September, 1943.

MERCHANTS TRANSFER &
STORAGE COMPANY

By SAMUEL C. HORNER

Secretary

SKINNER & EDDY CORPORA-
TION

By LEWIS L. STEDMAN

Secretary

LEWIS L. STEDMAN

Liquidating Trustee of Skin-
ner and Eddy Shipbuilding
Company, a dissolved corpo-
ration.

State of Washington,
County of King,—ss

Samuel C. Horner, being first duly sworn, on oath, deposes and says:

That he is the Secretary of Merchants Transfer & Storage Company, a corporation, one of the petitioners above named; that he makes this verification for and on behalf of said corporation and is authorized so to do; that he has read the foregoing Petition for Rule and Attachment in Re: Contempt, knows the contents thereof and believes the same to be true.

SAMUEL C. HORNER

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal)

J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle.

ROY D. ROBINSON and
RUMMENS & GRIFFIN

Attorneys for Merchants Transfer & Storage Company

LEWIS L. STEDMAN,

Attorney for Skinner & Eddy Corporation
and per se. [41]

EXHIBIT "A"

[Printer's Note: Exhibit "A" is not reproduced here as it is identical with "Order Denying the Necessity of Taking and the Right to Possession", which is set out beginning at page 21 of this printed record.]

EXHIBIT "B"

War Department
Office of Division Engineer
Pacific Division
Seattle Real Estate Sub-Office
217 Lloyd Building
Seattle, 1, Washington

8 September 1943

Refer to File No. FD 601.53 (1) Seattle, Wn.
Merchants Transfer and Storage Company

NOTICE OF TAKING OF IMMEDIATE POS-
SESSION BY THE UNITED STATES OF
AMERICA

To: Merchants Transfer and Storage Company
24 West Connecticut Street,
Seattle, Washington.

This is to notify you that on the 2nd day of August, 1943, there was filed in the United States District Court, in and for the Western District of Washington, Northern Division, a petition for condemnation under the Second War Powers Act, entitled United States of America vs. 43,355 square feet of land, more or less, situate in King County, State of Washington; Merchants Transfer & Storage Co., et al, Case No. 781, condemning the right to immediate possession of the following described property, to-wit:

Lot 4, Black's Replat of Portions of Lots 18
and 19 of Block 368, Seattle Tide Lands, ac-

ording to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the East line of said Lot 4 and a line parallel to said produced line and 10 feet West thereof, And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3, produced North, and the West line of said Lot 6 produced North Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any, of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less. [44]

This is to notify you that the United States of America is taking immediate possession of said premises for the term or terms condemned in the aforementioned petition under authority of the Act of Congress approved March 27, 1942 (Public Law 507 77th Congress), wherein is granted authority to the Secretary of War to take immediate possession of said premises and the Secretary of War having delegated this authority to the Division Engineer through the Chief of Engineers.

For the Division Engineer:

(Sgd.) SHERMAN B. GREEN

Chief, Seattle Sub-Office

Date_____

Receipt is hereby acknowledged of the above notice:

MERCHANTS TRANSFER AND STORAGE
COMPANY

By_____ [45]

[Title of District Court and Cause.]

AFFIDAVIT OF LEWIS L. STEDMAN IN
SUPPORT OF PETITION TO PUNISH
FOR CONTEMPT FOR FAILURE TO
OBEY JUDGMENT

United States of America

Western District of Washington

Northern Division—ss:

Lewis L. Stedman, being first duly sworn, on oath deposes and says:

That he is the Lewis L. Stedman designated in the Petition in Condemnation as Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and is the Secretary of Skinner & Eddy Corporation, each a designated defendant in the original petition in condemnation.

That there was served upon affiant, as Liquidating Trustee and as Secretary of Skinner & Eddy Corporation, a Notice from Sherman B. Green, "Chief, Seattle Sub-Office", being identical with the notice attached to the petition herein and marked Exhibit "B".

That on September 9th, 1943, affiant endeavored to enter the premises sought to be condemned, being the identical [46] premises upon which hearing was had in this Court and cause and the order entered denying necessity of taking and right to possession (Exhibit "B" attached to the petition herein) and was met by the armed forces of the United States, and access to said premises denied until he was duly recognized.

Thereupon he was permitted to enter said premises for a conference with Major S. N. Tidemon, Jr. and said Sherman B. Green, who were then and now are in complete possession of said premises in behalf of the War Department of the United States.

LEWIS L. STEDMAN

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal) /s/ J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF SAMUEL C. HORNER IN
SUPPORT OF PETITION TO PUNISH
FOR CONTEMPT FOR FAILURE TO
OBEY JUDGMENT

United States of America
Western District of Washington
Northern Division—ss:

Samuel C. Horner, being first duly sworn, on oath deposes and says:

I am the Secretary of Merchants Transfer & Storage Company, a corporation, one of the petitioners above named, and one of the defendants in the "Petition in Condemnation".

I have read and verified the original Petition for

Rule and Attachment in re: Contempt, and the matters therein alleged are true.

That affiant attended all phases of the hearing before this Court in the application of the Petitioner in Condemnation for immediate possession of the premises in said petition described.

That said premises are the identical premises seized, as hereinafter stated, by Petitioner, acting through the War Department and after the entry of the order denying the [48] necessity of taking and the right to possession. (Exhibit "A" attached to the petition herein).

That the Merchants Transfer & Storage Company was conducting its business as usual in said premises when, at about the hour of 5:50 P. M., August 8th, 1943, and at a time when, as petitioner is informed and believes, all United States District Judges in this District were absent from the District and attending upon a Circuit and District Judges' Conference in San Francisco, California, the United States of America, Petitioner in Condemnation, through Sherman B. Green, subscribing himself as "Chief, Seattle Sub-Office" of the War Department, had served upon affiant, upon said premises, the Notice attached to the Petition herein and marked "Exhibit B."

That at the same time, Major S. N. Tidemon, Jr., of the United States Army, accompanied by armed forces of the United States Army, forcibly seized possession of said premises, posted notices that same had been occupied by the United States Government

and placed armed forces of the United States in and about said premises.

That said Tidemon did further direct that no shipments of merchandise would be permitted to enter said premises; that cars with merchandise on the siding might be unloaded on the platform but the merchandise not placed in said premises.

That the said Green and said Tidemon, with armed forces of the United States, as aforesaid, physically seized the immediate possession and use of said premises and have ousted Merchants Transfer & Storage Company, a corporation, from the occupancy and use thereof.

That said Tidemon notified affiant to inform all his customers that no merchandise could be or would be permitted [49] to be received at said premises and on affiant's refusal so to do without the advice of counsel, said Green and said Tidemon began such notification of affiant's customers directly.

SAMUEL C. HORNER

Subscribed and sworn to before me this 11th day of September, 1943.

(Seal) J. L. CORRIGAN

Notary Public in and for the State of Washington,
residing at Seattle.

(Copy Recd 9-11-43 F. P. Keenan)

[Endorsed]: Filed Sept. 13, 1943. [50]

[Title of District Court and Cause.]

NOTICE OF INTENTION TO APPEAR AND
ASK LEAVE OF COURT TO FILE PETI-
TION

To the United States District Court of America,
the petitioner above named, and

To Ernest Falk, United States Attorney, attorney
for petitioner above named:

You Are Hereby Notified and Will Please Take Notice, that at the opening of the above entitled court, at the hour of 10:00 o'clock in the forenoon, on Monday, the 13th day of September, 1943, or as soon thereafter as counsel can be heard, at the court-room of the above entitled court in the City of Seattle, State of Washington, the Respondents, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation, by the undersigned, their attorneys, will apply to the court and ask leave of the court for permission to file their petition herein, a copy of which petition is hereto attached and served upon you, and based on said petition will at said time apply to the court for a rule of attachment as and for contempt of court directed to and against the following named persons, who are named in Paragraph IX of said petition, namely: Sherman B. Green, Major S. N. Tidemon, Jr., and Honorable Robert P. Patterson, Under-Secretary of War, and

Honorable Henry L. Stimson, Secretary of War, and also directed to and against all persons acting by, through or under them or any of them, or in concert with them, or any of them, and that said Respondents will also at said time apply to the court for an order requiring the said above named persons, and all persons acting by, through or under them or any of them, or in concert with them or any of them, forthwith to remove from and vacate the premises referred to in said petition, and requiring them, and each of them, [51] forthwith to restore to the Respondents the quiet and peaceful possession of said premises and the whole and every part thereof, and to cease and desist from interfering with the Respondents in their possession of said property, or any part thereof, and the Respondents will also at said time and place apply to the court for such other and further orders of court and rules as shall be meet in the the premises.

Dated at Seattle, Washington, September 11, 1943.

/s/ ROY D. ROBINSON

/s/ TRACY E. GRIFFIN RDR

Attorneys for Merchants
Transfer & Storage Com-
pany

/s/ LEWIS L. STEDMAN

Attorney for Skinner & Eddy
Corporation

/s/ LEWIS L. STEDMAN

Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation.

9/11/43

Copy Rec'd

Dept. of Justice

F. P. Keenan

[Endorsed]: Filed Sept. 13, 1943. [52]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter coming on for hearing upon the petition of the Merchants Transfer & Storage Company and Skinner & Eddy Corporation, and it appearing to the court that the importance of the matter and the ends of justice require as early a hearing on the show cause order herein entered as possible, and considering the advice of counsel.

It Is Hereby Ordered that the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr. and the United States of America appear before this Court in its Court Room, at the United States Court House, in Seattle, Washington, on the 20th day of September, 1943, at 2:30 o'clock in the afternoon, and at said time and place to show cause, if [53] any they

have, why all of the relief demanded in the prayer of the petition of the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation filed herein on September 13, 1943 should not be granted and why the natural persons, to-wit, the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr. should not be punished for contempt for not abiding the order of this court, dated August 13, 1943, and to further show cause why said natural persons, and each of them, and the United States of America should not forthwith restore the possession of the property described in the petition of condemnation and in the property owner's petition to the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation.

It Is Further Ordered that the service of this show cause order forthwith be made upon the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr. by day letter telegram stating a synopsis of the contents hereof to each of them wherever they may be found and by mailing to each of said persons an uncertified copy of this order by ordinary mail, postage prepaid, to their last known post office addresses and that the service of this order may be made upon the United States of America by delivery of an uncertified copy thereof to its counsel of record.

Done In Open Court this 17th day of September,
1943.

JOHN C. BOWEN

District Judge

[Endorsed]: Filed Sept. 17, 1943. [54]

[Title of District Court and Cause.]

MARSHAL'S RETURN ON ORDER TO SHOW
CAUSE

I hereby certify and return that in accordance with the Order To Show Cause entered in the above described cause on September 17, 1943, on September 17, 1943 I did cause a day letter telegram stating a synopsis of the contents of said Order to Show Cause to be sent via Western Union Telegraph Company to the Honorable Henry L. Stimson, Secretary of War, and to the Honorable Robert P. Patterson, Under Secretary of War, both at Washington, D. C., to Sherman B. Green and Major S. N. Tiedeman, Jr., both at U. S. Army Office of the Division Engineer, 351 California Street, San Francisco, California.

I further certify and return that on the same date, namely September 17, 1943, I did mail by ordinary mail uncertified copies of said Order to Show Cause to each of the above named persons at their last known post office address as follows: Honorable Henry L. Stimson and Honorable Robert P. Patterson, both at Washington, D. C., Sher-

man B. Green at Real Estate sub-office, 217 Lloyd Building, Seattle, Washington, and Major S. N. Tiedeman, Jr., at Office of Division Engineers, San Francisco Branch Office, 351 California Street, San Francisco, California.

H. W. ALGEO

United States Marshal

By DONALD F. MILLER

Chief Deputy

Marshal's costs—\$8.12

[Endorsed]: Filed Sept. 20, 1943. [55]

Return On Service of Writ

No. 781

United States of America,

Western District of Washington—ss:

United States of America vs. 43,355 Square Feet of
Land, more or less, Situate in King County,
State of Wash. et al.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named F. P. Keenan by handing to and leaving a true and correct copy thereof with him personally at Seattle, Washington in said District on the 17th day of September, 1943.

H. W. ALGEO

U. S. Marshal.

By PATRICK J. BRADLEY

Deputy

Marshal's fee \$2.00

[Endorsed]: Filed Sept. 20, 1943. [56]

[Title of District Court and Cause.]

PLEA TO JURISDICTION

Comes Now the United States of America, appearing specially and solely for the purpose of this motion, and hereby moves the court for an order to quash and vacate the Order to Show Cause, entered September 17, 1943, upon the following grounds:

1. That the court has no jurisdiction to review the official acts of the Secretary of War, in determining that the use of the property involved in the above-entitled action is necessary for military purposes.

2. That the proceeding instituted by the filing of respondent's Petition for Rule and Attachment In Re Contempt, constitutes a proceeding separate and apart from the above-entitled condemnation case, and the United States of America has not consented to be sued in the proceedings instituted by the filing of said Petition for Rule and Attachment In Re Contempt.

3. That a suit for an injunction against the United States will not lie. [57]

4. That this court is without jurisdiction to enjoin officials of the United States of America, where the result would be to enjoin the United States of America.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

ERNEST FALK

Special Attorney Department
of Justice

[Endorsed]: Filed Sept. 20, 1943. [58]

[Title of District Court and Cause.]

**MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.**

Comes Now Henry L. Stimson, Secretary of War, by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to the Honorable Henry L. Stimson, Secretary of War. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Henry L. Stimson.
2. Henry L. Stimson has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [59]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Robert P. Patterson, Under Secretary of War, by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to the Honorable Robert P. Patterson, Under Secretary of War. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Robert P. Patterson.
2. Robert P. Patterson has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [60]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Major S. N. Tideman, Jr., by his undersigned attorneys, and appearing specially and solely for the purpose of this motion, and hereby moves the Court to quash and vacate the order to show cause entered September 17, 1943, directed to Major S. N. Tideman, Jr. This motion is based upon the following grounds:

1. This Court has no jurisdiction of the person of said Major S. N. Tideman, Jr.
2. Major S. N. Tideman, Jr. has not been lawfully served with process or notice.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

[Endorsed]: Filed Sept. 20, 1943. [61]

[Title of District Court and Cause.]

MOTION TO QUASH AND VACATE ORDER
TO SHOW CAUSE ENTERED SEPTEMBER 17, 1943.

Comes Now Sherman B. Green, appearing specially and solely for the purpose of this Motion, and hereby moves the court to quash and vacate the order to show cause, entered September 17, 1943, directed to the said Sherman B. Green.

This Motion is based upon the following grounds:

1. That this court has no jurisdiction of the person of the said Sherman B. Green, for the reason that the relief prayed for against the said Sherman B. Green in the Petition for Rule and Attachment In Re Contempt, filed September 13, 1943, cannot lawfully be granted, because to do so would, in effect, enjoin the United States, which is not subject to injunction.

2. That it affirmatively appears from the respondent's Petition for Rule and Attachment In Re Con-

tempt, hereinbefore mentioned, and the files and records in the above-entitled case, that no order of court has been violated by the said Sherman B. Green, or at all.

3. That the Secretary of War is an indispensable party to this proceeding, and until the Secretary of War becomes subject to the jurisdiction of this court in this proceeding, the said Sherman B. Green is not subject to the said show-cause order. [62]

4. That it affirmatively appears from the respondent's Petition for Rule and Attachment In Re Contempt that Sherman B. Green is a subordinate in the War Department and cannot be punished for contempt, or enjoined for carrying out his orders from the Secretary of War, or the said Sherman B. Green's immediate superior.

Dated at Seattle, Washington, September 20, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The At-
torney General

ERNEST FALK

Special Attorney

[Endorsed]: Filed Sept. 20, 1943. [63]

In the District Court of the United States
For the Western District of Washington
Northern Division

No. 781

UNITED STATES OF AMERICA,

Petitioner,

vs.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON:

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation; SKINNER & EDDY
CORPORATION, a corporation; LEWIS L.
STEDMAN, Liquidating Trustee of Skinner
and Eddy Shipbuilding Company, a dissolved
corporation;

KING COUNTY, WASHINGTON, a municipal
corporation,

UNKNOWN OWNERS, being all other persons or
parties unknown having or claiming any right,
title, estate, lien or interest in the real estate
described in the petitioner herein,

Respondents.

ORDER DIRECTING RETURN
OF PROPERTY ETC.

Be It Remembered, this matter having come on
to be heard upon the Return Day to that certain

Order to Show Cause issued out of this Court and cause September 17th, 1943, directing the Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, Major S. N. Tiedeman, Jr., and the United States of America to show cause why said natural persons named—"should not be punished for contempt for not abiding the order [82] of this court, dated August 13, 1943, and to further show cause why said natural persons, and each of them, and the United States of America should not forthwith restore the possession of the property described in the petition of condemnation and in the property owner's petition to the Merchants Transfer & Storage Co. and the Skinner & Eddy Corporation"; and

Proof of service of said order having been had as directed therein, as shown by return of United States Marshal; and

The petitioners appearing by Geo. H. Rummens, Tracy E. Griffin and Lewis L. Stedman, their attorneys; and

The United States of America appearing specially and filing a plea to jurisdiction through its attorneys, Norman M. Littell, Assistant Attorney General, F. P. Keenan, Special Assistant to the Attorney General, and Ernest Falk, Special Attorney, Department of Justice; and

The Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, appearing specially by said Assistant Attorney General and Special Assistant by way of

“Motion to Quash and Vacate Order to Show Cause entered September 17th, 1943”; and

Sherman B. Green appearing by said Assistant Attorney General, Special Assistant and Special Attorney by way of “Motion to Quash and Vacate Order to Show Cause entered September 17th, 1943”; and

This Court having heard argument of counsel and being advised in the premises did overrule the plea to jurisdiction of the United States of America; and

The matter after further argument having been [83] submitted to the Court for determination; and

This Court finding that the natural persons cited have not done anything required or forbidden by the Court and having done whatever they may have done with respect to the possession of said property outside of the presence of the Court, and have therefore not personally violated this Court’s order of August 13th, 1943, and are not in contempt,

It Is Ordered that the Honorable Henry L. Stimson, Secretary of War, the Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr., are not in contempt of this Court, and the application for rule and attachment as to said natural persons be, and the same hereby is, denied; and

This Court finding that the plaintiff, United States of America, has taken possession of the property in issue unlawfully and without right and contrary to this Court’s order of August 13th, 1943, denying it immediate possession,

It Is Ordered, Adjudged and Decreed that the United States of America forthwith return said property, and the whole thereof, being the property in the petition for condemnation more particularly described, to the possession of Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner & Eddy Shipbuilding Company, a dissolved corporation, and that the United States of America forthwith, upon the entry of this order, vacate said premises; and

The United States of America, through its attorneys of record, having stated in open Court that possession will not be surrendered and the Mandate of this Court obeyed, [84]

It Is Ordered that if upon the entry of this order possession is not forthwith restored to said parties named, then the United States of America will be later assessed as for contempt damages the amount thereof to be ascertained by further hearings herein, at which hearings consideration may be given to such damages as those entitled to possession will suffer from day to day during the time that the United States of America wrongfully withholds that possession. To the entry of those portions of the foregoing order adverse to it the United States of America excepts and its exception is allowed.

Done In Open Court this 21st day of September,
1943.

JOHN C. BOWEN

District Judge

RUMMENS & GRIFFIN

and

LEWIS L. STEDMAN

Attorneys for Respondents (now Petitioner)

LEWIS L. STEDMAN

1107 American Bldg.

Seattle, Washington.

Presented By:

TRACY E. GRIFFIN

[Endorsed]: Filed Sept. 21, 1943. [85]

[Title of District Court and Cause.]

EXCEPTIONS TO ORDER DIRECTING
RETURN OF PROPERTY, ETC.

Petitioners, separately, except to the following parts and portions of the Order Directing Return of Property, Etc., entered in the above entitled cause, entered herein Sept. 21, 1943:

“This Court finding that the natural persons cited have not done anything required or forbidden by the Court and having done whatever they may have done with respect to the possession of said property outside of the presence of the Court, and have therefore not personally

violated this Court order of August 13th, 1943,
and are not in contempt.”

And Further except to the refusal of the Court
to find the Honorable H. L. Simpson, Secretary of
War, guilty of contempt; and

Further Except to the refusal of the Court to
find the Honorable Robert P. Patterson, Under
Secretary of War, guilty of contempt; and [86]

Further Except to the refusal of the Court to
find Herman B. Green guilty of contempt; and

Further Except to the refusal of the Court to
find Major S. N. Tiedeman, Jr. guilty of contempt.

RUMMENS & GRIFFIN and
LEWIS L. STEDMAN
LEWIS L. STEDMAN
TRACY E. GRIFFIN

Attorneys for Petitioner
1107 American Bldg.,
Seattle, Washington

The foregoing exceptions are hereby allowed.

JOHN C. BOWEN

Judge

[Endorsed]: Filed Sept. 21, 1943. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, and

To Merchants Transfer & Storage Company, a corporation, and Roy D. Robinson and Rummens & Griffin, its attorneys, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, its attorney, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and

To King County, Washington, a municipal corporation.

Notice is hereby given that the United States of America, petitioner in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the order designated as "Order Directing Return of Property," entered September 21, 1943, in the above-entitled action, which ordered and decreed that the United States [88] of America forthwith vacate and return the property described in the Petition for Condemnation in the above-entitled case to the possession of Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and

which ordered that if the United States of America does not forthwith restore possession to said parties upon the entry of the order directing return of said property, the United States of America will be assessed damages as for contempt.

Dated at Seattle, Washington, this 27th day of September, 1943.

NORMAN M. LITTELL

Assistant Attorney General

F. P. KEENAN

Special Assistant to The
Attorney General

ERNEST FALK

Special Attorney

Department of Justice

Attorneys for

United States of America

Office and Post Office Address:

Department of Justice

Washington, 25, D. C.

or

655 Skinner Building

Seattle, 1, Washington

[Endorsed]: Filed Sept. 27, 1943. [89]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, and

To United States of America, Petitioner, and Norman M. Littell, Assistant Attorney General, F. P. Keenan, Special Assistant to the Attorney General, Ernest Falk, Special Attorney, Department of Justice, as Attorneys for the United States of America, and

To King County, Washington, a municipal corporation:

Notice Is Hereby Given that Merchants Transfer & Storage Company, a Corporation, Skinner & Eddy Corporation, a Corporation, and Lewis L. Stedman, Liquidating Trustee [90] of Skinner and Eddy Shipbuilding Company, a dissolved corporation, Respondents in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of the order designated as "Order Directing Return of Property" entered September 21st, 1943, in the above entitled action, which ordered and decreed that the Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green, and Major S. N. Tiedeman, Jr., were not in contempt of the Court "and the application for rule and attachment as to said natural persons be, and the same hereby is denied."

Dated at Seattle, Washington, this 4th day of October, 1943.

ROY D. ROBINSON and
RUMMENS & GRIFFIN
TRACY E. GRIFFIN

Attorneys for Respondents,
Merchants Transfer & Storage Company, a Corporation.

LEWIS L. STEDMAN
LEWIS L. STEDMAN

Attorney for Respondent,
Skinner & Eddy Corporation and Lewis L. Stedman,
Liquidating Trustee of
Skinner and Eddy Shipbuilding Company, a dissolved corporation.

[Endorsed]: Filed Oct. 4, 1943. [91]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Now on this 4th day of October, 1943, there is presented to the Court the Petition of Respondents, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, praying for an appeal herein to the United

States Circuit Court of Appeals for the Ninth Circuit, and it appearing that respondents are appealing from a portion only of that certain order directing return of property entered September 21st, 1943, [92] and refusing to adjudge the natural persons involved in contempt and that said Respondents appeal and urge as error only that portion of said order,

It Is Therefore Ordered by the Court that an appeal be, and the same is hereby allowed said Respondents, as provided by law, to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of said order refusing to find said natural persons, Honorable Henry L. Stimson, Secretary of War, Honorable Robert P. Patterson, Under Secretary of War, Herman B. Green and Major S. N. Tiedeman, Jr., in contempt; and

It appearing that the Petitioner, United States of America, has duly appealed from the other portions of said order,

It Is Ordered that a single transcript of the proceedings in said cause as same is now being prepared by the first appellant, United States of America, will be sufficient in all particulars upon this appeal; and

It Is Ordered that Citation Issue as provided by law, and the Respondents herein shall file bond for costs.

Dated at Seattle, Washington, this 4th day of October, 1943.

JOHN C. BOWEN

District Judge

ROY D. ROBINSON and

RUMMENS & GRIFFIN

TRACY E. GRIFFIN

Attorneys for Respondents,

Merchants Transfer & Storage Company,
a corporation

LEWIS L. STEDMAN

LEWIS L. STEDMAN

Attorney for Respondents,

Skinner & Eddy Corporation and Lewis L.
Stedman, Liquidating Trustee, Skinner
and Eddy Shipbuilding Company, a dis-
solved corporation.

[Endorsed]: Filed Oct. 4, 1943. [93]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

The appellant, The United States of America, makes the following concise statement of points it intends to rely upon on appeal:

1. The trial court erred in overruling United States of America's Plea to Jurisdiction.
2. The trial court erred in not holding that the United States of America was rightfully in possession of the premises involved.

3. The trial court erred in holding that the United [98] States of America had taken possession of the condemned property unlawfully and without right, and contrary to the trial court's order of August 13, 1943.

4. The trial court erred in holding that there was an order that could have been violated by the United States of America.

5. The trial court erred in issuing a mandatory injunction against the sovereign, United States of America.

6. The trial court erred in decreeing that in the event said mandatory injunction was not obeyed, the sovereign, United States of America, would be assessed damages for contempt of court.

NORMAN M. LITTELL

Assistant Attorney General

VERNON L. WILKINSON

F. P. KEENAN

ERNEST FALK

Attorneys for Petitioner

(Copy of within received Oct. 25, 1943)

LLOYD SHORETT

Prosecuting Attorney.

Copy Received

Date Oct. 25, 1945

ROY D. ROBINSON &

RUMMENS & GRIFFIN

Attorneys for Merchants Tfr.
& Stor. Co.

Copy reed. 10/25/43

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp.

[Endorsed]: Filed Oct. 25, 1943. [99]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE RECORD
ON APPEAL

The appellant, The United States of America, designates the following to be included in the record on appeal:

1. Petition in Condemnation, filed August 2, 1943.
2. Motion to Dismiss under Rule 12-B, filed August 4, 1943.
3. Court's Oral Decision, filed August 11, 1943.
4. Findings of Fact and Conclusions of Law, filed August 13, 1943.
5. Order denying the necessity of taking and the [100] right to possession, filed August 13, 1943.
6. Petition for Rule and Attachment in re Contempt, filed September 13, 1943.
7. Notice of Presentation of Petition, filed September 13, 1943.
8. Order to Show Cause, filed September 17, 1943.
9. Plea to jurisdiction, filed September 20, 1943.

10. Motion of Henry L. Stimson, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

11. Motion of Robert P. Patterson, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

12. Motion of Major S. M. Tideman, Jr., appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

13. Motion of Sherman B. Green, appearing specially, to quash and vacate Order to Show Cause, filed September 20, 1943.

14. Court's Opinion re Plea to Jurisdiction, filed October 4, 1943, as of September 21, 1943.

15. Court's Opinion re Contempt Proceedings, filed September 21, 1943.

16. Order Directing Return of Property, etc., filed September 21, 1943.

17. Respondents' Exceptions to Order Directing Return of Property, etc., filed September 21, 1943.

18. Notice of Appeal by the United States of America, Petitioner, filed September 27, 1943.

19. Notice of Appeal by the Merchants Transfer & Storage Company, a corporation; Skinner & Eddy Corporation, a corporation; Lewis L. Stedman, Liquidating [101] Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, filed October 4, 1943.

20. Order allowing appeal, filed October 4, 1943.

21. Narrative Statement of Testimony taken August 4th and 5th, filed October 5, 1943, and Reporter's transcript of testimony taken August 7, 1943, filed October 4, 1943.

22. Transcript of Proceedings on October 4, 1943, and Court's Oral Opinion, filed October 5, 1943.

23. Certificate of Judge with respect to transcript of testimony and opinions and decisions of Court, filed October 5, 1943.

24. Petitioner's Exhibits 1, 2, 3 and 4.

25. Respondents' Exhibits A-1 and A-2.

26. Appellant's Statement of Points to be relied upon on appeal.

27. This designation.

NORMAN M. LITTELL

Assistant Attorney General

VERNON L. WILKINSON

F. P. KEENAN

ERNEST FALK

Attorneys for Petitioner

Copy of within received Oct. 25, 1943.

LLOYD SHORETT

Prosecuting Attorney.

Copy Received Date Oct. 25, 1943

ROY D. ROBINSON &

RUMMENS & GRIFFIN

Attorneys for Merchants Tfr.
& Stor. Co.

Copy recd. 10/25/43 .

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp.

[Endorsed]: Filed Oct. 25, 1943. [102]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE ACTION

There having come on regularly for hearing motion of Petitioner for entry of an order extending the time for filing the record on appeal and docketing the action, the Court having considered the motion and affidavit of F. P. Keenan in support thereof and the files and records herein, it appearing to the Court that the time within which the Petitioner may file the record on appeal and docket the action has not yet expired, and the Court being fully advised in the premises, now therefore,

It is hereby Ordered that the time within which the Petitioner, The United States of America, may file the record on appeal and docket the action in the Circuit Court of Appeals for the Ninth Circuit is extended to December 6, 1943.

Done in Open Court October 26, 1943.

LLOYD L. BLACK

United States District Judge

Presented and Approved by:

NONA F. COX

Special Attorney, Department
of Justice

Approved by:

ROY D. ROBINSON

By T. E. G.

RUMMENS & GRIFFIN

By TRACY E. GRIFFIN

Attorneys for Respondents

LEWIS L. STEDMAN

Atty for Skinner & Eddy
Corp. Lewis L. Stedman,
Liquidating Trustee Skinner
& Eddy Shipbuilding
Co.

[Endorsed]: Filed Oct. 26, 1943. [103]

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON UPON THE CROSS-AP-
PEAL

The Respondents and Cross-Appellants, Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, make the following concise statement of points they intend to rely upon on appeal:

I.

The Trial Court erred in sustaining the plea to jurisdiction. [104]

II.

The Trial Court erred in holding that the petition stated a cause of action in seeking to condemn, as in the petition stated, a portion only of the leasehold interest specified.

III.

The Trial Court erred in holding that the constitutional rights of Cross-Appellants were not violated.

IV.

The Trial Court erred in not holding the individual persons, Henry L. Stimson, Robert P. Patterson, Herman B. Green and Major S. N. Tiedeman, Jr., in contempt of Court.

ROY D. ROBINSON and

RUMMENS & GRIFFIN

Attorneys for Respondent,

Merchants Transfer &

Storage Company, a

Corporation.

LEWIS L. STEDMAN

Attorney for Respondent,

Skinner & Eddy Corpora-

tion and Lewis L. Stedman,

Liquidating Trustee of

Skinner and Eddy Ship-

building Company, a dis-

solved corporation.

By TRACY E. GRIFFIN

[Endorsed]: Filed Nov. 2, 1943. [105]

[Title of District Court and Cause.]

RESPONDENTS' PROPOSED AMENDMENT
TO PETITIONER-APPELLANTS' —
“DESIGNATION OF THE PORTIONS OF
THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL”

The Respondents and Cross-Appellants, Merchants Transfer & Storage Company, a corporation, et al designate that the additional be included in the record on appeal, to-wit:

8-a Return of United States Marshal in re service Order to Show Cause filed September 19th, 1943.

This Return is either a part of the file or entered [106] as an exhibit and if the Petitioner-Appellants' designation is not amended accordingly, than these Respondents in addition to the designation of Appellant do designate specifically as an addition thereto 8-a as aforesaid.

ROY D. ROBINSON and
RUMMENS & GRIFFIN

Attorneys for Respondents,
Merchants Transfer & Storage Company, a corporation

LEWIS L. STEDMAN

Attorney for Respondents,
Skinner & Eddy Corpora-
tion and Lewis L. Stedman,
Liquidating Trustee of
Skinner and Eddy Ship-
building Company, a dis-
solved corporation

By TRACY E. GRIFFIN

[Endorsed]: Filed Nov. 2, 1943. [107]

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL OF
EXHIBITS TO THE CIRCUIT COURT OF
APPEALS

This cause having come on regularly for hearing, upon stipulation of the parties hereto for the entry of an order pursuant to Rule 75(i), Federal Rules of Civil Procedure, directing the Clerk of this Court to transmit to the Circuit Court of Appeals of the Ninth Circuit certain original exhibits introduced at the hearing of said cause, and the court having considered the stipulation and the files and records herein,

It is hereby Ordered that the exhibits mentioned in said stipulation, namely, Petitioner's Exhibits 1, 2, 3 and 4, and Respondents' Exhibits A-1 and A-2, be transmitted by the Clerk of this Court to the Clerk of the Circuit Court of Appeals for the Ninth

Circuit for the use of the Circuit Court of Appeals in the [107-a] consideration of this case on appeal, and thereafter, returned by him to the Clerk of this Court on remand of the cause to this Court.

Done in open Court this 9 day of November, 1943.

LLOYD L. BLACK

United States District Judge

Presented and approved by:

NONA F. COX

Special Attorney

Department of Justice

[Endorsed]: Filed Nov. 9, 1943. [107-b]

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 107b, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain

of record and on file in the office of the Clerk of said District Court at Seattle, except as to the Narrative Statement and Transcript of Testimony as certified and filed October 5, 1943, the original of which is enclosed herewith as part of the record on appeal in this cause, [108] and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 251 folios at 5c	\$12.55
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record....	.50
Certificate of Clerk to Original Exhibits.....	.50
<hr/>	
Total	\$18.55

I further certify that the foregoing fees have not been paid for the reason that the appeal is being prosecuted by the United States Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court

at Seattle, in said District, this 12 day of November, 1943.

[Seal]

JUDSON W. SHORETT,
Clerk

By TRUMAN EGGER.
Chief Deputy. [109]

[Title of District Court and Cause.]

NARRATIVE STATEMENT OF TESTIMONY
TAKEN AT HEARING ON AUGUST 4, 1943
AND AUGUST 5, 1943

Be It Remembered, that heretofore and on, to-wit, August 4, 1943, at the hour of 4:30 P. M., the above entitled cause came on for continuation of hearing therein before the Honorable John C. Bowen, one of the judges in the above entitled court;

Ivan Merrick, Esq., and Ernest Falk, Esq., appearing for and on behalf of petitioner;

Roy D. Robinson, Esq., and Tracy E. Griffin, Esq., appearing for and on behalf of respondent, Merchants Transfer & Storage Compasy;

Lewis L. Stedman, Esq., appearing for and on behalf of respondent, Skinner & Eddy Corporation;

Whereupon the following proceedings were had and done, to-wit:

LIEUTENANT-COLONEL
HARRY H. WATSON,

called as a witness on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

I am the Supply Officer of the Army Transport Service. I have charge of the purchasing and handling of supplies for the repair and outfitting of ships of the Army Transport Service at the Seattle Port of Embarkation. I am familiar with the property occupied by the Merchants Transfer & Storage Company, the temporary use of which the United States of America is seeking to condemn in this action. The building is a four story frame building with a part basement. It is entirely surrounded by other lands and buildings already in the possession of the Port of Embarkation or which is in the process of acquisition. The building in question is needed by my division of the Army Transport Service of the United States for the storage of military supplies, including repair parts for ships, such as pipes, castings, fittings, boiler plates and other heavy metal objects and also other various items used for outfitting and supplying vessels.

At the present time I have no storage space in the Port of Embarkation for use in this manner. We have no other space to store these articles. The volume of military traffic passing through the Port of Embarkation is increasing very rapidly. It is necessary for the United States to have the use of

(Testimony of Lieut.-Col. Harry H. Watson.)

this property for the successful prosecution of the war. The property is needed immediately and will be absolutely required within thirty days.

On

Cross-Examination

the witness testified as follows:

I do not know everything that will be stored in the building. The present plans provide for the use of a large part of the building by my department for storing ships' repair parts and supplies for ships which come under my jurisdiction. I am only concerned with that part of the building which will be used by my department. I am not familiar with the warehouse space in the City of Seattle which has been taken over by the various departments of the Government or how much thereof is actually in use. I only know about the amount of warehouse space available for my department. We would require a building having a floor load carrying capacity from 175 to 200 pounds per square foot.

In answer to direct question by the Court the witness stated that the pipes, castings and fittings could be stored outside temporarily, but not permanently, but that he would prefer to have it in a warehouse.

J. STANLEY MULLANE,

called as a witness on behalf of the petitioner having been first duly sworn, was examined and testified as follows:

I am an Associate Land Appraiser in the Seattle office of the Real [2*] Estate Branch of the U. S. Army Engineers. I am familiar with the property described in the Petition in Condemnation. It is shown in red on petitioner's Exhibit 1 (petitioner's Exhibit 1 admitted in evidence). This property under condemnation is completely surrounded by other property which is in the possession of the United States. The other property is either owned by the United States, is being leased by it, or the United States is in possession and the amount of rental is being negotiated.

On

Cross-Examination

the witness testified as follows:

The estate taken is for a term of years ending June 30, 1944, with the right of renewal. The reason for the term ending June 30, 1944 is that that date is the end of the fiscal year and Congress allots funds from year to year. That is the reason the term is stated as ending June 30, 1944, together with the right to renew and does not initially cover the entire period of the Merchants Transfer & Storage Company lease.

I do not know of any vacant warehouse building in the City of Seattle which is suitable for the Mer-

*Page numbering appearing at foot of page of original Reporter's Transcript.

(Testimony of J. Stanley Mullane.)

chants Transfer & Storage Company, to which it could move the merchandise stored in the building involved in this action. (Petitioner objects to this testimony and all testimony going to show that the respondent Merchants Transfer & Storage Company found it difficult or impossible to move their business elsewhere and also the use to which the building was being put by the Merchants Transfer & Storage Company. Objection overruled, exception allowed. It was stipulated by counsel and approved by the Court that petitioner should have a continuing objection and exception to this line of testimony).

There is no room in the Port of Embarkation area and particularly the area to the north of the building under consideration, upon which additional buildings could be constructed. Two new piers, designated as Pier D. and Pier E. are under construction and the space to the north and northwest of the building in question will be used in connection with those piers. The Army has taken possession and use of other buildings in this vicinity, either under lease or under condemnation. The Army has taken the Moran and Henry buildings on First Avenue South, the Goodrich Building on South Alaskan Way and the Stacy-Lander Street piers and warehouse of the Port of Seattle. [3]

R. C. ANDERSON,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Vice President of Skinner & Eddy Corporation, a corporation which is the owner of the property in question. On February 6, 1941, we leased the property to the Merchants Transfer & Storage Company for a period of five years, commencing March 1, 1941. This lease is still in good standing. A copy of the lease was introduced in evidence as respondents' Exhibit A-1.

RESPONDENTS' EXHIBIT No. A-1

This Indenture, executed in triplicate this sixth day of February 1941, by and between Skinner & Eddy Corporation, a Washington corporation, party of the first part, (hereinafter designated as the lessor) and Merchants Transfer & Storage Co., a Washington corporation, party of the second part, (hereinafter designated as the lessee),

Witnesseth: That in consideration of the covenants and agreements of the lessee hereinafter set forth and of the sum of Four Thousand Two Hundred Fifty And No/100 * * * * * (\$4,250.00) Dollars, now paid to the lessor by the lessee, the receipt whereof is hereby acknowledged, the said lessor does hereby lease and demise unto the said lessee those certain premises situate in the City of Seattle, King County, Washington, particularly described as follows, to-wit:

Beginning at the Northeast corner of Lot 3 of Black's Replat of Portions of Lots 18 and 19 of Block 368 Seattle Tide Lands and running thence North along the East line of said lot 3 produced North to the North line of Lot 17 of Block 368 of Seattle Tide Lands; thence West along said North line 290 feet to a point which is 448.616 feet West of the Northeast corner of said lot 17; thence South 13 feet; thence East 35 feet; thence South 45 feet to the South line of said lot 17; thence East along said South line 255 feet to the point of beginning; and

Lots 3, 4, 5 and 6 of Black's Replat of Portions of Lots 18 and 19 of Block 365 of Seattle Tide Lands.

On which is situated building known as 24 West Connecticut Street, auto sheds and yard.

for the purpose of conducting therein Storage and Transfer Business and for no other purpose whatsoever, for the term of Five (5) Years commencing on the first day of March 1941, and ending at the expiration of the twenty-eighth day of February 1946, at the monthly rental of Eight Hundred Fifty And No/100 * * * * * (\$850.00) Dollars, Rider hereto attached, marked Exhibit "A" and containing special clauses, is by reference thereunto made a part hereof.

payable in advance on the first day of each and every month during said term at the office of Henry Broderick Inc., Agents, at Second and Cherry, Seattle, Washington, or at such other place as the lessor may from time to time designate, which said

sum the lessee expressly covenants and agrees to pay at the time and in the manner herein stated.

The above payment of Four Thousand Two Hundred Fifty And No/100 * * * * (\$4,250.00) Dollars now made, shall, in the event of the full and faithful performance of all the covenants and agreements in this lease by the lessee to be performed, be credited in payment of the last one month's rent of each year of said term; otherwise said payment this day made shall belong to the lessor as part of the consideration to lessor for the execution of this lease.

Said premises are accepted by lessee in their present condition, and shall be kept in good order, condition and repair during the term of this lease by the lessee at lessee's sole cost and expense, except outside walls, roof and foundation, and the lessee agrees that at the expiration of the said term or sooner termination of this lease, lessee will quit and surrender the said premises without notice and in good order, condition and repair, damage by the elements or fire excepted.

Said lessee agrees that the lessor or lessor's agents, shall not be held for any damage to property, or personal injuries caused by any defects now in said premises or hereafter occurring in or about said premises.

And it is further agreed that all personal property in said demised premises shall be at the risk of lessee only, and that lessor or lessor's agents shall not be liable for any damage, either to person or property, sustained by lessee or other persons, due to the building in which said demised premises are

situate, or any part or appurtenances thereof becoming out of repair or rising from the bursting or leakage of water, gas, sewer or steam pipes, or from any act or neglect of employees, co-tenants or other occupants of said building, or any other person, or due to the happening of any accident from whatsoever cause in and about said building.

This lease or any part hereof shall not be assigned by lessee, or by operation of law, or otherwise, nor said premises or any part thereof sublet without the written consent of the lessor endorsed hereon; and in the event such written consent shall be given, no other or subsequent assignment, assignments or subletting, shall be made by such assignee or assignees or sublessee without previous consent of lessor first had and obtained in writing.

The lessor shall not be called upon to make any improvements or repairs of any kind upon said premises, and said premises shall at all times be kept in good order, condition and repair as aforesaid, by lessee, and shall also be kept and used in accordance with the laws of the State of Washington and ordinances of the City of Seattle, and in accordance with all directions, rules and regulations of the health officer, fire marshal, building inspector, or other proper officer of the City of Seattle, at the sole cost and expense of said lessee and lessee will keep the said premises in a clean, sanitary, wholesome and safe condition in accordance with all directions of all proper officers of the City of Seattle, and State of Washington, and will perform all re-

quirements of law, ordinance or otherwise, touching said premises; that lessee will permit no waste, damage, or injury to said premises, and at lessee's own cost and expense, will keep all drainage pipes free and open and will protect water, heating and other pipes so that they will not freeze or become clogged, and will repair all leaks, and will also repair all damages caused by leaks or by reason of lessee's failure to protect and keep free, open and unfrozen any of the pipes and plumbing on said premises.

The lessee will allow the said lessor or lessor's agents, free access at all reasonable times to said premises for the purpose of inspection or of making repairs, additions or alterations to the demised premises or any property owned by or under control of lessor, but this right shall not be construed as an agreement on the part of lessor to make any repair, all of such repairs to be made by the lessee as aforesaid.

In the event lessee becomes voluntarily or involuntarily bankrupt, or if a receiver, assignee, or other liquidating officer is appointed for the business of said lessee then this lease shall be void, if the lessor shall so elect.

In the event said premises shall be destroyed or damaged by the elements or fire to such an extent as to render the same untenable in whole or in a substantial part thereof it shall be optional with the lessor to rebuild or repair the same; and after the happening of any such contingency, the lessee shall have the right to declare this lease terminated

by written notice served upon the lessor, unless the said lessor or lessor's agents shall within twenty days after such destruction or damage notify the said lessee in writing of lessor's intention to rebuild or repair said premises or the part so damaged as aforesaid, and if lessor elects to rebuild or repair said premises lessor shall prosecute the work of such rebuilding or repairing without unnecessary delay and, during such period the rent of said premises shall be abated in the same ratio that that portion of the said premises rendered for the time being unfit for occupancy shall bear to the whole of said leased premises.

And it is further provided and agreed that in the event the building in which said premises hereby leased are located, shall be destroyed or damaged by fire, earthquake or other casualty (even though said premises hereby leased shall not be affected by said fire, earthquake or other casualty) to such an extent that in the opinion of lessor it shall not be practicable to rebuild or repair, then it shall be optional with lessor to terminate this lease by written notice served on lessee within ten days after such destruction or damage.

Any notice required to be served in accordance with the two preceding paragraphs of this lease shall be sent by registered mail, the notice from the lessee to be sent to the lessor in care of lessor's agents, and the notice from the lessor to be sent to lessee at the demised premises.

The lessee agrees that lessee will not display in the windows or doors of the premises herein leased,

or upon any exterior part of the building, any signs or symbols without the permission of the said lessor in writing first had and obtained.

The said lessee will not carry any stock of goods, or do anything in or about said premises which will in any way tend to increase the insurance rates on said premises.

It is expressly agreed that the lessee shall not sell, give away or otherwise dispose of intoxicating liquors upon said premises.

The lessee agrees to pay for all light, heat and water used in or charged against said premises during the term of this lease.

The lessee shall not make any alterations, additions, or improvements in said premises, without the consent of lessor in writing first had and obtained, and all alterations, additions and improvements which shall be made, shall be at the sole cost and expense of lessee and shall become the property of the said lessor and shall remain in and be surrendered with the premises as a part thereof at the termination of this lease, without disturbance, molestation or injury.

The lessor shall have the right to place and maintain "For Rent" signs in a conspicuous place on said premises for thirty (30) days prior to the expiration of this lease.

If any rents above reserved, or any part thereof shall be and remain unpaid when the same shall become due, or if lessee shall violate or default in any of the covenants, agreements, stipulations or conditions herein, then it shall be optional for the lessor

to declare this lease forfeited and the said terms ended, and to re-enter said premises, with or without process of law, using force as may be necessary to remove all persons or chattels therefrom, and the lessor shall not be liable for damage by reason of such re-entry or forfeiture; but notwithstanding such re-entry by the lessor the liability of the lessee for the rent provided for herein shall not be relinquished or extinguished for the balance of the term of this lease. And it is further agreed that the lessee will pay, in addition to the rentals and other sums agreed to be paid hereunder, such additional sum as the court may adjudge reasonable as attorney's fees in any suit or action instituted by the lessor to enforce the provisions of this lease, or the collection of the rentals due the lessor hereunder.

It is further understood and agreed that for convenience the terms "lessor" and "lessee" and verbs and pronouns in the singular number are uniformly used throughout this lease regardless of gender, number or fact of incorporation of the parties hereto.

It is further mutually covenanted and agreed between the parties hereto that no waiver by lessor of a breach by lessee of any covenants, agreement, stipulation or condition of this lease shall be construed to be a waiver of any succeeding breach of the same covenant, agreement, stipulation or condition or a breach of any other covenant, agreement, stipulation or condition; also that all the covenants, stipulations, conditions, and agreements herein contained shall extend to and be binding on

the heirs, executors, administrators, successors and assigns to the parties hereto.

This lease has been negotiated by Henry Broderick Inc.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year in this instrument first above written.

Witnesses:

[Seal] SKINNER & EDDY CORPORATION

By M. H. KEIL

Attest:

Its.....

[Seal] MERCHANTS TRANSFER & STORAGE CO.,

By JAMES A. WALKER

Its Prest.

Attest:

SAM C. HORNER

Its Sec. Treas

EXHIBIT "A"

Possession:

It is hereby further understood and agreed that the premises are now occupied and that the lessor will endeavor to get possession of said premises by March 1, 1941, and will, if necessary, take legal steps to do so, but in no event shall lessee hold the lessor liable for any claim for loss or damage by reason of failure to get possession of said premises

and lessee agrees to waive all claim whatsoever for loss or compensation, excepting a proportional rebate of rent during the time possession of the premises may be withheld.

Tax Increase As Additional Rental:

As additional rental, the lessee shall pay fifty (50%) per cent. of all increases in taxes levied against said property during the term of the lease over and above the amount of the general taxes becoming due and payable February 15, 1941 known as the 1941 general taxes.

Interest On Lease Consideration:

It is agreed that if this lease shall still be in force and provided the same shall be in good standing by the prompt and faithful performance of all the covenants and agreements on the part of the lessee to be performed, and not otherwise, the Lessor will pay annually to the Lessee on the first day of February during the term hereof beginning with the first day of February 1942, interest accrued at the rate of five (5%) per cent. per annum from March 1, 1941 and thereafter the interest accrued at said rate from February first of each preceding year on any portion of said lease consideration of \$4,250.00 which has not theretofore been applied as rental as herein provided.

Option To Purchase:

As a further consideration for the execution of this lease, the Lessor does hereby grant to the Lessee an option to purchase the demised premises as follows:

If exercised on or before June 1, 1941, at a pur-

chase price of Seventy Thousand and no/100 (\$70,000.00) Dollars in cash.

If exercised on or before December 1, 1941, but after June 1, 1941, at a purchase price of Seventy-five Thousand and no/100 (\$75,000.00) Dollars in cash.

In event of exercise of option to purchase, title shall be shown by title insurance policy furnished by lessor to lessee in the amount of such purchase showing the property to be free and clear of all encumbrances excepting this lease and such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price. Conveyance to be made by statutory warranty deed; rents, insurance, current taxes and interest on encumbrances, if any, are to be adjusted as of date deed is delivered.

J.A.W.

M.H.K.

S.C.H.

State of Washington,

County of King.—ss.

On this 6th day of February A. D. 1941, before me personally appeared M. H. Keil to me known to be the Treasurer and..... of Skinner & Eddy Corporation the corporation that executed the within and foregoing instrument, and acknowledged the same instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and

that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal] M. D. ARUQUIST

Notary Public in and for the State of Washington,
residing at Seattle.

State of Washington,
County of King.—ss.

On this sixth day of February A. D. 1941, before me personally appeared James A. Walker to me known to be the President and Sam C. Horner to me known to be the Secretary-Treasurer of Merchants Transfer&Storage Co., the corporation that executed the within and foregoing instrument, and acknowledged the same instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year first above written.

[Seal] HOMER E. BAILEY

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Aug. 4, 1943.

J. A. CLARK,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Seattle manager of Parrot & Co., food brokers. We are representatives of the U & I Sugar Company which has a sugar processing plant at Toppenish in the Yakima Valley. The production of sugar by the corporation is in excess of its storage facilities at the plant. About 400,000 bags of sugar are sold annually by the company on the west side of the mountains. About 150,000 pass through the Merchants Transfer & Storage Company warehouse. The warehouse facilities of the Merchants Transfer & Storage Co. in Seattle are now and have been for some time used by the company to distribute its product to the various grocery stores, retail centers and other customers in the Seattle area. The amount of sugar kept on hand at the warehouse of the Merchants Transfer & Storage Co. and in transit thereto average between 12,000 and 13,000 bags at all times, which is about the normal amount kept in the warehouse and in transit thereto. The new crop will start coming in about September 15th, which will mean that the storage facilities will have to be increased for the purpose of handling this new crop. The Merchants Transfer & Storage Company have rendered satisfactory service. Their place of business is convenient for the service of our various customers. The question of taking over the warehouse by the Gov-

(Testimony of J. A. Clark.)

ernment has been up for consideration two or three times in the past year and I have made an active canvass of warehouse conditions in Seattle. I do not believe that there is any other warehouse or storage company, which would have the space available for handling our business. The rationing situation requires the carrying of sugar in various size packages and the Interstate Commerce Commission are very strict. There are car loading limitations which [4] make it necessary for us to avail ourselves of warehouse storage and direct transportation facilities. The civilian population and the defense workers require the delivery of our sugar for their consumption. Unless we have adequate warehouse facilities and a delivery system comparable to that of the Merchants Transfer & Storage Company we cannot hope to deliver and supply the Seattle district with sugar.

The Court continued the hearing until August 5, 1943 at 9:15 A. M.

On August 5, 1943 at 9:15 A. M., the Court reconvened and the following proceedings were had:

A. E. HULLIN,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am with the Hullin Transfer Company. I am

(Testimony of A. E. Hullin.)

also the President of the Washington State Warehouse Men's Association and of the Federal Emergency Association of Seattle. I am in the warehouse business myself in Seattle and I am thoroughly familiar with the storage and warehouse business in the City and with the buildings suitable for public warehouses. I know of no building to which the Merchants Transfer & Storage Co. could move, if they were required to vacate their present building. No other warehouse in the city could accommodate and furnish sufficient warehouse space to the larger customers of the Merchants Transfer & Storage Co. Warehouses are classified by Government agencies as essential war industries. All of the warehouses in the City of Seattle belonging to the association, including the Merchants Transfer & Storage Co., have entered into an agreement with the Federal Emergency Warehouse Association, whereby they allocate and reserve 10% of their space for the use of the War Department.

M. M. HOUCK,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Assistant District Manager at Seattle of the Great Atlantic & Pacific Tea Co. and of Nakat Packing Company. A. & P. have eight large supermarkets in Seattle and one each at Renton

(Testimony of M. M. Houck.)

and Bremerton. The reserve stock for replenishing the stock of each individual store is warehoused [5] with the Merchants Transfer & Storage Company. They not only warehouse this reserve stock of all grocery items, but also distribute the replacement stock to the individual stores for us. A large part of our grocery items consists of canned and bottled fruits, vegetables and other products, all of which would be very seriously damaged or totally destroyed by freezing. We require a heated warehouse for the storage of our goods.

At the present time we have about 86,000 separate pieces warehoused at the Merchants building. The Merchants Transfer Co. deliver about 600 tons a month to our retail stores from the warehouse. About a year ago, when there was the first suggestion that the Army might take the Merchants building, I inquired about other warehouses that could take care of us. I do not know of any warehouse that could now take care of us. I do not know of any building to which the Merchants could move.

On two or three former occasions, the War Department have threatened to take over the warehouse. On these different occasions I have caused to be communicated to Senators Walgren and Bone the position we would be placed in with relation to supplying necessary food products to the civilian population and defense workers and on each occasion the movement of the War Department to take

(Testimony of M. M. Houck.)

over the warehouse has been suspended. The present action was started immediately after Congress adjourned.

On

Cross-Examination,

the witness testified as follows:

There is no extra space in our various markets where we could store the reserved stock, all of the available space in each market is in use. None of the markets have basements and there is no room in the back of the stores for the storage of reserved stock. The buildings were not constructed with the idea of storing the reserve stock in each market only only sufficient space is reserved in the back of the stores to unpack and handle the incoming merchandise, which is to go immediately upon the shelves for distribution. To operate economically we must maintain our reserve stock in a central warehouse from which it can be distributed to the various retail markets as the goods are sold and distributed by the individual stores. Much of our goods come in cartons; nearly all of the canned goods have labels, which would be very severely damaged unless they were stored in a dry [6] place. Consequently we cannot use sheds or temporary buildings. The buildings must be dry and in the wintertime must be heated.

LEON H. HERKENRATH,

called as witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I have been connected with and familiar with the warehouse business in Seattle for many years. I am now manager of a warehouse. For a number of years I was connected with the State of Washington Department of Public Service and assigned to the division which has jurisdiction over warehouses. I am familiar with the present situation in Seattle with regard to warehouse space. I know of no building to which the Merchants Transfer & Storage Company could move if they are required to give up their present building. I know of no warehouse that could take over the larger customers of the Merchants Transfer & Storage Company. It has been my observation and experience that iron and steel pipe fittings and castings are frequently stored out of doors and in temporary buildings.

SAM C. HORNER,

called as a witness on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

I am the Secretary-Treasurer of the Merchants Transfer & Storage Company, a Washington corporation. We are conducting business as a public warehouse, licensed under the laws of the State of

(Testimony of Sam C. Horner.)

Washington, under the Uniform Warehouse Receipts Act. We are also under regulation by the Ordinances of the City of Seattle and operating under various agencies of the Federal Government, including the Customs Department, Internal Revenue, Office of Defense Transportation and the Interstate Commerce Commission. We also act as a bonded warehouse for the purpose of holding merchandise under Customs Regulations for the United States Government. Under an agreement made between the Warehouse Association and the United States Army, we have set aside 10% of our warehouse space to be held for the use of the Government. We are classed by the various agencies of the U. S. Government as an essential war industry.

[7]

We are leasing the property in question from Skinner & Eddy Corporation under a five year lease, which has been introduced in evidence. We formerly occupied a warehouse one block south and east of our present location. It was known as the Russell Warehouse. It had approximately 60,000 square feet of floor space. The ground floor had a floor loading capacity of 600 pounds per square foot. In 1941, the United States condemned the fee title of this building for the Port of Embarkation and we were forced to move. After investigating we leased the present warehouse. It was the only property available that could be adopted to our need. It had been used as an office building and for light storage by the Skinner & Eddy Corpora-

(Testimony of Sam C. Horner.)

tion Shipbuilding Company during the last war. Immediately prior to our occupancy it had been used for offices and for loft storage space. It cost us \$12,500.00 to fix up the building so that it was suitable for our purpose. This would equal \$2,500.00 for each of the five years of the term. The building has four stories and one-half basement. It is steam heated and is centrally located for the transaction of our line of business.

We have over 200 customers. We have many small customers and a number of large customers. Two of our principal customers are the Great Atlantic and Pacific Tea Co. and the U & I Sugar Co. Their *tonage* is coming into and going out of storage daily in carload lots. It consists of groceries and foodstuffs almost exclusively for the use of civilian population and defense workers. We also warehouse groceries and foodstuff for the Alaska trade of our customers. The warehouse is filled practically all of the time to its full capacity. We receive and distribute on the average of 150 tons per day. Our records are quite complete and show every ton of merchandise as received and sent out, either by the day or the month of the year.

I have thoroughly canvassed the City of Seattle looking for warehouse space, which would be available in the event we are required to move and I have used the offices of the leading real estate firms of the city for that purpose. I find that there is absolutely no space available in the City of Seattle which would accommodate our business and I fur-

(Testimony of Sam C. Horner.)

ther find that there is no space available in the City of Seattle or in other warehouses which are also taxed to capacity, which would be available for the accommodation of our larger customers. [8]

Sometime ago I canvassed the railroads to see if it would be possible to have them build a warehouse for us, which would be suitable for our use, upon their property and lease the same to us and I find that because of priorities and labor shortages that it was absolutely out of question to have a warehouse built for our accommodation.

The third and fourth floors of our building have a floor load capacity of 125 pounds to square foot. After working on the building we increased the floor load capacity to 175 pounds to square foot and the ground floor to 400 pounds to square foot. None of the space above the ground floor or basement would be suitable for the storage of iron pipe, castings or fittings or any other heavy product.

The Court continued the hearing to August 7, 1943, at 9:30 A. M.

We approve the foregoing narrative statement consisting of nine pages including this.

LEWIS L. STEDMAN

Attorneys for respondents

ROY D. ROBINSON

RUMMENS & GRIFFIN

Attorneys for Respondents

[Endorsed]: Filed Oct. 5, 1943. [9]

[Title of District Court and Cause.]

Be It Remembered, that heretofore and on, to-wit, August 7, 1943, at the hour of 9:30 A. M., the above entitled cause came on for continuation of hearing therein before the Honorable John C. Bowen, one of the judges in the above entitled court;

Ivan Merrick, Esq., and Ernest Falk, Esq., appearing for and on behalf of Petitioner;

Roy D. Robinson, Esq., and Tracy E. Griffin, Esq., appearing for and on behalf or respondent Merchants Transfer & Storage Company;

Lewis L. Stedman, Esq., appearing for and on behalf of respondent Skinner & Eddy Corporation;

Whereupon the following proceedings were had and done, to-wit: [1]

Seattle, Washington

August 7, 1943

9:30 A. M.

The Court: Are the parties and counsel ready to proceed with the further trial in the condemnation case against the Merchants Transfer and Storage Company?

Mr. Merrick: Petitioner is ready, your Honor.

* Page numbering appearing at foot of page of original Reporter's Transcript.

Mr. Griffin: Respondents are ready your Honor.

SAM C. HORNER,

previously sworn as a witness, called by and on behalf of the respondents, resumed the witness stand and further testified as follows:

Direct Examination (Continued)

By Mr. Griffin:

Q. I think at the close, before the recess, you were testifying about the contents of the warehouse property at this time? A. Yes, I was.

Mr. Merrick: For the purpose of the record, we have a reporter this morning. I wish the witness would state his name?

The Witness: Sam C. Horner.

The Court: Will you state your occupation, please?

The Witness: Secretary-Treasurer of the Merchants Transfer and Storage Company.

Mr. Merrick: Merchants Transfer and Storage Company is one of the respondents in this proceeding and Skinner and Eddy Corporation is also a party to this proceeding, is that correct? [3]

The Witness: Oh, yes.

Q. (By Mr. Griffin): Go ahead?

A. I was giving the figures on the goods on hand of the Atlantic Pacific Tea Company held in our warehouse in June for the retail outlets for civilian and war workers' consumption.

Do you want me to repeat the amount?

Q. What was the amount?

A. 86,934 packages. That includes case goods, all kinds of case goods, sugar and coffee and so forth.

(Testimony of Sam C. Horner.)

Q. Have you any idea of the tonnage involved in that? A. They averaged 45 pounds.

Q. The average package?

A. That is the average on them, yes, sir.

We deliver to the retail outlets with our own trucks—which we have a fleet of trucks, you know — and they work ninety percent hauling in and out of the warehouse. Our city business otherwise is not very great. We hauled out for Great A. and P. 1,006,400 pounds in June.

Q. Is that an average month?

A. Well, no. July will exceed that. The more people comes into the city, the more it takes to feed them.

We also delivered for Utah-Idaho Sugar Company. It went through our warehouse from February 1 to July 31, 9,291,580 pounds of sugar. This was also delivered by our own trucks.

We have 19 motor units in our fleet and they are kept busy hauling in and out of our warehouse with the other percentage of the business.

We have in our employ 31 truck drivers and helpers, [4] and seven office workers, and two of the company owners,—myself and Mr. Walker.

Q. Is the major portion of your warehousing and distribution food for the civilian population and armed forces? A. It is.

Q. What percentage of the floor area of that warehouse do you have in use?

A. We have the total area.

(Testimony of Sam C. Horner.)

Q. Is any of the storage specifically reserved now under agreement with some department of the United States government for government purposes?

A. The Federal Emergency Warehouse Corporation of Seattle.

Q. What percentage is that?

A. 10 percent.

Q. Now the merchandise that you have in there——

Mr. Merrick: Just a minute. The same question was asked in the last question. The petitioner objected to it on the ground it is incompetent, irrelevant and immaterial. The Court overruled the objection; to which an exception was taken and allowed.

Counsel for petitioner and the respondent have stipulated that it will not be necessary to take further objections or exceptions to this line of questioning, it being understood that the objection and exception goes to the whole of this line of questioning.

Mr. Griffin: That is correct.

The Court: The Court approves.

Mr. Griffin: Would you read the question, please?

(Whereupon the last question was read as recorded.) [5]

Q. (By Mr. Griffin): The merchandise that you have in there is for the civilian use and the armed forces? A. That is correct.

Q. Principally in foods?

(Testimony of Sam C. Horner.)

A. Principally in foods and materials.

Q. Do you know what your total tonnage is at the present time or what the average is?

A. Well, that fluctuates, you see, from day to day. I figure that we have on hand yesterday 10,000 tons of merchandise.

Q. What proportion of that is foodstuffs, would you say? A. I would say 90 percent.

Q. 90 percent? A. Yes.

Q. And of the other materials, what is the nature of those?

A. Well, we have wire which all goes to the ship-yards.

Q. Would what is known in the United States today as critical materials cover most of the other?

A. That is right.

Q. Now, does another branch of the United States government use your warehouse, to-wit the customs?

A. United States Customs.

Q. And just what use does the United States Customs make, and what proportion of the property do the Customs have?

A. The United States Customs has 9,000 feet in their own lockers. They store import goods waiting for the duty to be paid. We pay the Customs officer his time for taking out the material from these lockers and the Customs, of course, require certain restrictions on a building.

Our building has the A. D. T.—American District [6] Telegraph—burglar alarm. It also has supervision of the sprinkler system by the American Tele-

(Testimony of Sam C. Horner.)

graph. Should a sprinkler system go off, the fire department would know it instantly. And should someone break into the building, the American District Telegraph would know it instantly and would turn that call into the riot squad of the police department which has been done once or twice by mistakes of something going wrong with the system.

Q. Was the building especially altered to fit the use by the United States Customs?

A. Yes, sir.

Q. Altered by you, I mean, when you went in?

A. When we went in there. We couldn't take our lockers from the other building.

Q. There has been introduced in evidence in this cause petitioner's exhibit one. (indicating map). This is given as north. The portion in red here has been designated as the property sought to be taken; to-wit, the *the* warehouse in which you have your storage.

Will you orient yourself on that?

A. This includes the building and the vacant lot, —I mean the lot where we store our trucks, and our loading platform. Does it include the whole thing?

Mr. Griffin: I don't know. All I can say is that the testimony of the petitioner shows that the red includes the property being taken. Whether it includes the lot, I don't know.

Mr. Merrick: If the Court please, we have a map delineated in color as your Honor suggested the other day. If it is not interfering, it might be well to [7] introduce that for identification.

(Testimony of Sam C. Horner.)

Mr. Griffin: That is all right.

The Clerk: It will be marked petitioner's exhibit number 2.

Mr. Griffin: Perhaps by using this new map—Does the Court care to look at this red one? Counsel advised me that the red on this exhibit 2 corresponds with the red on exhibit 1 which is the property sought to be acquired.

The Court: Very well.

Q. (By Mr. Griffin): Now immediately to your east, I believe it is, there is a building in green on the map, exhibit 1, apparently in brown on this map exhibit 2?

The Court: You had better make sure for the record that all of the distinguishing colors on the map, there being a great number of them, are accurately described for fear that somebody might be put off of the track in the future.

Mr. Griffin: There is a legend on here with it, your Honor.

The Court: Oh; I see the legend.

Q. (By Mr. Griffin): This building described in green—Goodrich Rubber Company building—is that immediately east of your plant? A. East.

Q. What was that building, was that a warehouse building?

A. That was a warehouse building. Also it housed Goodrich rubber on the upper floors.

Q. But it was a warehouse building?

A. Yes. [8]

Q. That was taken by the government was it?

(Testimony of Sam C. Horner.)

A. It was.

Q. What is it being used for?

A. I couldn't tell you. There is no storage in it.

Q. No storage in it.

Q. (By the Court): Is the building suitable for storage?

A. It is one of the best warehouse storage buildings in the city of Seattle.

Q. How far is it from your building?

A. 100 feet.

Q. Was it ever used for that purpose?

A. Oh, yes. I have stored sugar 20 sacks high in it on the first floor.

Q. (By Mr. Griffin): Do you recall about when the government took over that building?

A. It was along in I think October.

Q. 1942? A. Yes.

Q. It hasn't been used for storage at all?

A. Not to my knowledge.

Q. I was of the impression it was being altered into an office building. Do you have any information on that?

A. You see lumber going in it. It looks like it is to that effect.

Q. Now the Goodrich building was built as a warehouse building and used for that purpose ever since was it?

Mr. Merriek: If the Court please, we wish to place an objection to any questions as to what the government is using other buildings for in the vicinity as being incompetent and immaterial. [9]

(Testimony of Sam C. Horner.)

The Court: The objection is overruled.

Q. (By Mr. Griffin): What is the carrying load of your building as you reconstructed for warehouse purposed on the upper floors?

A. The upper floor, the fourth floor is 125 pounds to the square foot. The third floor is 125 pounds to the square foot. The second floor 170 pounds to the square foot. And the first floor, we have braced those very securely. We can put 400 pounds,—we have put 400 pounds to the square foot after our reconstruction.

The Court: How does the size of this adjoining 100 foot away building, already in possession of the government, compare with the size of your building?

The Witness: I think it is 10,000 square feet less than our building. I think it is around 90,000 square feet in the building, if my figures are correct. I never measured it off.

The Court: The square footage of your building is about 100,000 square feet, is that it?

The Witness: 97,200.

Q. (By Mr. Griffin): Were you advised by the War Department, the real estate branch, through some designated officer about September 6th of last year that your building was required immediately for war purposes? A. Yes.

Q. It was not taken over was it? A. No.

Mr. Merrick: Just a minute. If the advise is in writing, if it was in the form of a letter I would like to have it introduced. [10]

(Testimony of Sam C. Horner.)

Mr. Griffin: Will you mark this letter for identification please?

The Clerk: It will be respondent's Exhibit A-2.

(Letter marked as respondent's A-2 for identification.)

Q. (By Mr. Griffin): Handing you respondent's A-2 for identification, is this a communication received by you?

A. This is a copy of it, by the way. The original is in our files.

Q. This is a copy? A. That is a copy.

Mr. Merrick: If that corresponds to this copy, I would have no objection to it. (letters compared.)

Mr. Griffin: I offer in evidence exhibit 2 for identification.

The Court: It is admitted.

(Respondent's exhibit A-2 received in evidence.)

(Testimony of Sam C. Horner.)

RESPONDENT'S EXHIBIT NO. A-2

Merchants Transfer & Storage Co., Seattle

WAR DEPARTMENT

Real Estate Branch

North Pacific Division, U. S. Army Engineers

Lloyd Building, Seattle, Washington.

Refer to File No. 5 REB 601.53

September 6, 1942.

Merchants Transfer & Warehouse Company,

24 West Connecticut Street,

Seattle, Washington.

Attention: Mr. Sam C. Horner.

Dear Sir:

We have been requested by the Port of Embarkation, United States Army, to make available for their use all of the building now occupied by you and located at 24 West Connecticut Street, Seattle. It is our understanding that this building is owned in fee by Skinner & Eddy of Seattle, and we are, therefore, forwarding a copy of this letter for their attention.

It will be necessary that this property be turned over for the Army's use just as early as possible, and it is hoped that it can be made available within thirty days.

With reference to the rental which we will be able to pay for the property, we will have the property appraised immediately, so it will take some

(Testimony of Sam C. Horner.)

time to complete our appraisals and have them approved. We will be able to pay as rental for the use of the premises a reasonable rental value as shown by our appraisal.

We will appreciate your cooperation in making this property available for Army use as early as possible.

Yours very truly,

JOSEF DIAMOND,

Major, J.A.G.D.

Asst. Division Real Estate Director.

cc—Skinner & Eddy Corp.,

Skinner Bldg.,

Seattle, Washington.

[Endorsed]: Filed 8/7/43.

Q. (By Mr. Griffin): Thereafter did either the same or some other branch of the government make a demand requiring the building for immediate use?

A. In January of this year I was called to the real estate office in Seattle by a captain up from San Francisco.

Q. You said a real estate office; what did you mean?

A. The War.

Mr. Merrick: A real estate office of the War Department?

The Witness: Of the War Department, yes.

The Court: Is that in San Francisco?

(Testimony of Sam C. Horner.)

The Witness: No. This captain came up from San [11] Francisco and told me. I don't recollect just what date it was but it was some time in January.

R. C. Erskine around that time looked the building over. He is a real estate man. We wrote a letter to Mr. Erskine—I have a copy of it here—giving him facts about the building.

Q. (By Mr. Griffin): Were any other formal demands made until this proceeding?

A. No, no.

Q. Is there any available warehouse space in the city of Seattle at the present time to which you could move your goods now in storage?

A. There is not.

Q. If this property,—or rather, your lease is taken, what will you be required to do then?

A. Nothing left to do only liquidate.

Q. Liquidate the business?

A. That is right.

Q. How long a period of time will that require?

A. At least 12 months.

Q. Are all the goods in your warehouse under warehouse receipts? A. They are.

Q. Uniform warehouse negotiable receipts?

A. Some of them negotiable and others are non-negotiable. They only require negotiable receipts when they borrow money at the banks, and the bank accepts that negotiable form from us, under our bond with the state, and our licenses, you see.

Q. Is there available warehouse space or facili-

(Testimony of Sam C. Horner.)

ties in [12] Seattle at the present time for your larger customers?

A. No. They couldn't possibly get a large customer in any building that I know of. There is no room. I have surveyed the town myself.

Q. Have you also made a survey as to whether or not it would be possible to construct,—that is for you or someone in your behalf, other than the government, to construct warehouse facilities in Seattle at the present time?

A. I have talked to several people about construction. In fact, I went to the railroad in January and asked them if they would construct a building. I showed them the plot that I would like to have, and they said absolutely not.

Q. Because you mentioned that,—although I have covered it before, but we have a reporter now. You went to the railroad because the railroad owns the principle accessible properties for warehouse purposes?

A. That is right.

Q. Do you know whether or not the other warehouses in Seattle other than this Goodrich warehouse or warehouses owned by the government,—but I mean public warehouses are filled to capacity at the present time?

A. They are.

Mr. Merrick: If the Court please, my objection goes to this line of testimony about the availability of other space in the city of Seattle.

The Court: Is that agreeable to opposing counsel?

Mr. Griffin: Yes.

The Court: That is approved by the Court.

(Testimony of Sam C. Horner.)

Q. (By Mr. Griffin): Under the circumstances would the other public warehouses in Seattle be able to take over your [13] business,—I mean handle the business of your customers?

A. Absolutely not. The president of the Association of the state of Washington told me the other day,—he says, “Well, what are you going to do with it?” I said, “I don’t know.” He says, “There is no place in Seattle to put it.”

No warehouse can absorb any of it from the fact that they have allotted 10 percent to the federal government, War Department, and they have *go* to save that room.

Q. Now, if there was suitable warehouse space available, and within a reasonable distance from your plant, how long would it reasonably take assuming that the building was ready and fully fitted, how long would it take under present conditions in Seattle for you to move your entire stock to the other warehouse, considering business conditions as you move,—of merchandise coming in and going out?

A. It would take ninety days. That would be the best we could do it. It did the last time, and we didn’t have as much stock.

Q. The last time you refer to is the other government condemnation?

A. That is right. And we moved a block and a half.

Q. That is what I was going to ask you. You moved a block and a half?

(Testimony of Sam C. Horner.)

The Court: Did you in the other case put forth all the effort possible to move quickly?

The Witness: We did. We moved nights and Sundays. We took care of our business in the day-time and moved [14] what we possibly could. We paid overtime on more than 75 percent of the move to the union drivers. They worked three or four hours nights and all day Saturdays and Sundays.

The Court: Was it necessary to use the whole day time and night time for moving rather than the ordinary day work time?

The Witness: Yes, your Honor. In the day time we had all that our trucks could do to take care of the current every-day business. We had to work them overtime.

The Court: Were they so used to prevent losses which otherwise would have occurred?

The Witness: That is right. We would have lost business. We had to take care of it.

Q. (By Mr. Griffin): Your move the other time was about 6,000 tons wasn't it?

A. In the neighborhood of 6,000 tons, yes.

Q. Now you have over 10,500?

A. Something like that. It fluctuates, of course.

Q. Is this building that you are now in suitable for the storage of metals?

A. No, it is not.

Mr. Griffin: That is all.

The Court: The petitioner may inquire.

(Testimony of Sam C. Horner.)

Cross Examination

By Mr. Merrick:

Q. You handled about 550 tons of merchandise with A and P during the month of June, 1943, is that correct? [15]

A. That is correct.

Q. But you didn't have 550 tons of stuff on hand at all times or did you?

A. Oh, yes, we had more than that. That is just what we delivered to their retail stores from our warehouse.

Q. And you delivered and handled during six months, from February 1 to July 31, about 4145 tons of sugar,—that is over a six months period, that is correct is it not?

A. That is right.

Q. You have some 700 tons of sugar a month.

Now, the property that belonged to the United States government, you wouldn't have to worry about moving that under this condemnation would you?

A. We would have to move it. We are under bond to the federal government.

Q. You haven't any place to move it to you testified?

A. We would have to notify the United States Customs what to do with it.

Q. Assuming that the Court orders possession in the War Department, you would want to get out the private stuff like the food belonging to the A. and P. and the sugar belonging to the sugar company, and then you would have a lot of wire. What

(Testimony of Sam C. Horner.)

tonnage do you have in there in the nature of wire or metal goods or heavy goods?

A. Well, I never figured that up before I left.

Q. Well, is it over half?

A. It occupies 1,000 square feet.

Q. On the first floor?

A. On the basement floor.

Q. You are using four floors and the basement floor? [16] A. Yes.

Q. What do you have on the first floor?

A. Foodstuffs.

Q. By the way, the rated carrying capacity of your building is about 7,000 tons is it not?

A. 7,000 tons?

Q. 7,000 tons is the rated carrying capacity of the building?

A. It was until we braced up the lower floors.

Q. And instead of loading the lower floor 225 pounds per square foot you are now loading it 400 pounds? A. That is right.

Q. What do you have on the first floor?

A. Sugar and canned goods.

Q. You say you have 31 trucks?

A. 19.

Q. 19 trucks, and 31 truck drivers and helpers?

A. And we also had,—last month we had 1,022 hours of extra labor.

Q. What is the biggest tonnage you handled out of there in any day, can you tell? A. 120 tons.

Q. That is the most that you have ever handled in any day?

(Testimony of Sam C. Horner.)

A. That is about an average day, you see.

Q. I am asking you the biggest, the maximum handling capacity?

A. I could handle 250 tons out of there in a day.

Q. When you moved before, of course, you had in mind keeping the business going as nearly normal as possible did you not? A. Yes, sir. [17]

Q. And that naturally slowed up the moving. If you had nothing to do but move, you could have done it much quicker than 90 days, couldn't you?

A. Oh, if I had nothing to do but move, we could move lots quicker.

Mr. Merrick: I believe that is all.

Redirect Examination

By Mr. Griffin:

Q. And if you had some place to move?

A. If we had some place to move.

Q. And were not under liability to your customers? A. That is right.

Q. That is, if you were moving out on the city dump, like potatoes?

A. We could put our whole fleet on it, if we had no other business.

Mr. Griffin: That is all.

The Court: You may be excused from the stand. Call your next witness.

(Witness excused.)

A. L. PLOYART,

called as a witness on behalf of the respondents, having been first previously sworn, was examined and testified as follows:

Direct Examintaion

By Mr. Griffin:

Q. Will you state your name, please?

A. A. L. Ployart.

Q. What is your business? [18]

A. Industrial real estate.

Q. How long have you been engaged in that business in Seattle? A. About 12 years.

Q. And are you familiar with the present condition and conditions of the past few months or years of commercial property in Seattle?

A. Yes, sir. The chief source of my revenue is the leasing of warehouses.

Q. Will you state to the Court the warehouse situation as to availability of warehouses or space is and has been in Seattle for the past two years?

Mr. Merrick: I object to the question on the grounds it is outside of the issues and incompetent.

The Court: The present situation on that issue is if any such issue is now before the Court rather than the last two years. I would say the present.

Mr. Griffin: All right; the present.

The Court: So modified, the objection is overruled.

A. You want the present situation?

Q. (By Mr. Griffin): Yes.

(Testimony of A. L. Ployart.)

A. Well, there isn't any practical warehouse space available,—that is, for the operation of an industry like a warehouse company.

Q. What is required in the operation of a public warehouse such as the Merchants as to facilities?

Mr. Merrick: The same objection, your Honor.

The Court: Overruled.

A. Accessibility, rail facilities, and I suppose to a certain extent the floor load, floor capacity of the building, [19] convenience to the distributing points, protection as far as fire and theft is concerned.

Q. (By Mr. Griffin): Do you know of any accessible building in Seattle at the present time in which the Merchants Storage materials could be moved if they had to be moved today?

A. No, sir. Some time ago I leased the Merchants part of another building to take some of their overflow. It is rather difficult to find a practical operative situation even for that. I understand it was taken only out of consideration for his customers as an obligation to them.

Mr. Griffin: I think you may inquire.

Mr. Merrick: That is all.

The Court: You may step down.

(Witness excused.)

PAUL NELS CARLSON,

called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Griffin:

Q. State your name please?

A. Paul Nels Carlson.

Q. Your occupation, Mr. Carlson?

A. Contractor.

Q. In Seattle and King County?

A. Yes.

Q. How long have you been engaged in that business? A. 31 years.

Q. You are under what firm name? [20]

A. Teufel and Carlson.

Q. Not going into any details, you have had some of the large construction projects in and about this state? A. Yes.

Q. Are you familiar with the construction of warehouses for commercial use? A. Yes.

Q. Are materials available at the present time for such construction through anyone other than the government or its agencies?

Mr. Merrick: I object on the ground it is going outside of the issues, incompetent, irrelevant and immaterial.

The Court: Mr. Reporter, will you read the question?

(Whereupon the last question was read as recorded.)

(Testimony of Paul Nels Carlson.)

Mr. Merrick: And on the further ground it calls for a legal conclusion.

The Court: The objection is overruled.

A. Not without a directive from the War Production Board.

Q. (By Mr. Griffin): If there was a directive, with the priorities available, then still the materials would have to be found wouldn't they?

A. Priorities are not obtainable.

Q. Assume, however, that the material was available and that the labor was available,—and is there some assumption there as to labor? A. Yes.

Q. But assuming that both materials and labor were available how long in your opinion would it take or be required to [21] construct a suitable commercial warehouse building at the present time with a load capacity of let us say 10,500 tons?

A. Four to five months.

Q. That is assuming a site was had and you could start construction today? A. Yes.

Mr. Griffin: You may inquire.

Mr. Merrick: No questions.

The Court: You may be excused.

(Witness excused.)

The Court: Call the next witness.

Mr. Griffin: Respondent rests.

The Court: Any further testimony on the part of the petitioner?

Mr. Merrick: We have some rebuttal testimony. First, your Honor, I move to strike all of the testi-

mony of the Merchants Transfer and Storage Company on the ground it is incompetent, irrelevant and immaterial and outside of the issues of this case.

The Court: The motion is denied.

Mr. Merrick: I will call Major Meyers for rebuttal.

Mr. Falk: May it please the Court, the government is calling Major Meyers without waiving its position previously asserted in court with which your Honor is familiar, namely that the government is under the statutes entitled to immediate possession and that the only matter for determination by your Honor is, as well stated in that Peterman Manufacturing case, whether or not there is [22] an abuse in our discretion.

The government is not waiving the objections or any portion thereof in any portion of the case.

The Court: You may be sworn.

HARRY T. MEYERS,

called as a witness in rebuttal, on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Falk:

Q. Will you state your name, please?

A. Harry T. Meyers.

Q. And you are in the United States Army, attached to the Engineers?

A. Yes, sir.

(Testimony of Harry T. Meyers.)

Q. Showing you a map which has been identified as petitioner's exhibit 2, I will ask you to state whether or not you are familiar with that map?

A. Yes, sir.

Q. Was that prepared either by you *are* under your supervision?

A. It was prepared under my supervision.

Q. And upon the map there are six different colors. Does the legend in the lower center portion of the map correctly state the colors and the purposes? A. Yes, sir.

Q. For which they are used? A. Yes.

Q. And is that map which is a true and accurate depiction of the situation at the Seattle Port of Embarkation? [23] A. Yes, sir.

Mr. Falk: The government offers petitioner's exhibit number 2 in evidence.

Mr. Stedman: If the Court please, I think that counsel should show as of what date the map speaks.

Mr. Falk: I think that point is well taken.

Q. (By Mr. Falk): Major, as of what date does the map speak?

A. In so far as the property ownerships shown on there?

Q. Yes, that is correct. A. As of today.

Q. Is it a correct summary to state that all of the property except that depicted in red is either in the possession of the United States or that satisfactory voluntary arrangements have been made that the possession thereof be made to the United States?

Mr. Stedman: I object to that if the Court

(Testimony of Harry T. Meyers.)

please, because it speaks contrary to conclusion, the legend showing that certain of the properties are under negotiation.

Mr. Griffin: And of course that would not be the best evidence.

The Court: That objection is overruled.

Mr. Griffin: I object to it on the ground it is not the best evidence, also a conclusion.

The Court: Overruled.

Mr. Falk. The government repeats its offer in evidence of the map, your Honor.

The Court: Any objection?

Mr. Griffin: I object to it now as not properly identified as to legends. [24]

Mr. Stedman: I object to it if the court please on the ground that the map itself contradicts previous evidence of the government.

The Court: Gentlemen, I think the map is just merely explanatory in its purpose and is meant to enlarge upon the detail shown by the previous exhibit which was petitioner's exhibit 1, as I recall. And I think that while there might be some possible inaccuracy of detail that its main purpose is merely to show an enlarged scale of the information shown on the previous map.

Mr. Stedman: If that is the purpose, I have no objection.

The Court: From a practical standpoint I can see no harm, and I can see some benefit. The objection is overruled. The petitioner's exhibit 2 is now received in evidence.

(Petitioner's exhibit 2 received in evidence.)

(Testimony of Harry T. Meyers.)

Q. (By Mr. Falk) Major, how long have you been stationed at the Seattle Port of Embarkation?

A. Since January, 1941, the date of acquisition of the property.

Q. That was the acquisition of the old Pacific Steamship terminals?

A. The acquisition of the old Pacific Steamship terminals.

Q. That is indicated in what manner upon the map, petitioner's exhibit 2?

A. As green, and designated as acquired January, 1941, from Pacific Steamship Terminal. [25]

Q. In the course of your official duties have you had any connection whatsoever with the planning of the development of the expansion of the Port?

A. Well, I might say that I was the first person representing the government to establish an office on the property for the purpose of taking over the property and reconditioning it and renovating it for the occupancy of the War Department.

The Court: Which property is that?

The Witness: Pacific Steamship Terminal, in January, 1941.

Q. (By Mr. Falk) On January 1, 1941, what was the character of the Port of Seattle Port of Embarkation as to its rating as a Port?

A. It was then a primary,—or a sub port of the primary port in San Francisco.

Q. And was that status of a sub port changed at any time thereafter?

(Testimony of Harry T. Meyers.)

A. It was later made a primary port of embarkation.

Q. How many primary ports of embarkation are there in the United States?

A. That I can not give an accurate number.

Q. Are there any others; San Francisco is also a primary port is it not?

A. That is correct.

Q. And New York? A. That is correct.

Q. Are there any sub ports under the jurisdiction of the Seattle office, or Seattle area?

A. At the present time we have three. [26]

Q. Now you state that on January 1, the property which was formerly owned *an* occupied by the Pacific Steamship Terminal was taken over by the United States of America?

A. That is correct.

Q. Was any other property subsequently,—or what property was next acquired after that and when was it so acquired?

A. The next piece of property was designated as the Russel property, which was acquired in April, 1941.

Q. And that is the property that was formerly occupied by the Merchants, or a portion of which was occupied by the Merchants Transfer as lessee?

A. A portion of it was, yes.

Q. How was the Merchants Transfer and Storage described or identified on the map, by what color as the Russel property? A. Blue.

Q. And what was the next addition to the port facilities?

(Testimony of Harry T. Meyers.)

A. Well, the next addition as a government purchase was the so-called A. M. Castle property which was acquired in April, 1942.

Q. What did that property consist of generally?

A. Well, generally the old A. M. Castle steel shed which is now designated as our building 8. And a one story frame building along Connecticut Street which is now designated as our building 11. A gasoline service station formerly occupied by Kohl and Kohl. It is *one* the corner of Connecticut street and Alaskan Way. And also another building on the north side of Connecticut street now designated as our building 13, formerly the A. M. Castle office building. [27]

Mr. Falk: I might state to the Court that that A. M. Castle property is incorporated in an action in the records of this Court, of which I believe the Court will take judicial notice.

Q. (By Mr. Falk) What was the next property acquired in the expansion of the port?

A. The next piece of government owned property,—I can't say that it is government owned at this time, but it is under negotiation for ownership from the Port of Seattle.

Q. Is the government in possession of that property that you refer to that is under negotiation?

A. They are.

Q. And when you refer to negotiation it is simply a matter of determination of value?

A. That is correct. I say the War Department is now constructing and completing a pier and tran-

(Testimony of Harry T. Meyers.)

sit shed on this property from War Department funds. The land is the portion under negotiation.

Q. Does that pier show upon the map?

A. The pier is designated on the map as pier "D".

Q. And that is shown as what color?

A. Green.

Q. What is the next property?

A. Well, there is a piece of Port of Seattle property,—that is the extent of the government owned property. They are leased properties.

Q. Would you tell what is government leased property as shown in Seattle?

A. That is shown in orange and designated as pier "E".

Q. Is there anything under construction on pier "E"? [28]

A. There is a dock and pier sheds being constructed by the Port of Seattle.

Q. Do I understand then that there is under construction at the present time a pier designated as pier "D" and another pier designated as pier "E"? A. That is correct.

Q. When is it anticipated that pier "D" will be completed, the construction?

A. Pier "D" will be completed some time during the month of August. It is now being occupied by divisions of the Port of Embarkation,—portions of it.

Q. And you anticipate that during the month of August, 1943, that construction will be completed

(Testimony of Harry T. Meyers.)

and it will be ready to be placed in use as a major pier? A. That is correct.

Q. Terminal? A. Yes.

Q. Has the volume of traffic handled through the Seattle Port of Embarkation materially increased since January 1, 1942?

A. It has increased considerably.

Q. Has it increased since January 1, 1943?

A. It has.

Q. Do you anticipate whether there will be any increase during the coming months?

A. It could reasonably be expected.

Q. In connection with the cargo,—the volume of traffic which you reasonably anticipate will be handled covering both cargo and passenger traffic, will the government require this space designated on the map in red, and being the property described in the petition in condemnation [29] herein?

A. Well, it is now required for our present Port of Embarkation operation.

Q. And how soon will you need possession thereof?

A. Well, that could be answered immediately. Because it is now holding up moves at the Port of Embarkation that are necessary to accomplish the mission of the Port of Embarkation.

Q. If the army was not in possession of that property on August 31, 1943, would in your opinion the successful prosecution of the war be impeded or impaired? A. It would be impaired.

(Testimony of Harry T. Meyers.)

Q. Materially or slightly?

A. Well, it would be impaired materially in my opinion.

Q. (By Mr. Falk) Major, during the testimony this morning there was a reference to the Goodrich building. Is that building shown upon the map? A. Yes; it is in brown.

Q. And is that building being utilized at the present time? A. It is.

Q. For purposes other than storage,—or for what purpose is it being used? [30]

A. Well, at the present time it is being used for offices on the first floor. The upper floors are in the process of being remodeled.

The Court: For what purpose?

The Witness: For office space.

The Court: You are converting warehouse space into office space, is that right?

The Witness: We are converting the building into office space.

The Court: The building was used as storage. Did the government ever use it for warehouse space?

The Witness: They did for transit storage.

Q. (By Mr. Falk) During the period that you have been stationed in Seattle, have you had anything to do with the planning of the development of the Port of Embarkation?

A. I am now a member of the Planning Board.

Q. How long have you been such a member?

A. Just recently.

(Testimony of Harry T. Meyers.)

Q. In connection with your duties at the Seattle Port of Embarkation, do you know whether or not a comprehensive plan has been made for the development of the entire area depicted on the map?

A. It has.

Q. In your opinion, is the purpose for which each of those facilities is being developed necessary in order to have an integrated port?

A. In my opinion, yes.

Q. Referring to the map, Major, and to your knowledge of the local situation, within the area embraced by the [31] various colors, is there any occupancy other than that of the United States of America and the Merchants Transfer and Storage?

A. Not within the area covered by the plan.

Q. So that the present government buildings or present construction occupies the entire area except,—and completely surrounds the Merchants Transfer and Storage Company's facilities?

A. That is correct.

Q. For security reasons, is there any value to having this Merchants Transfer and Storage property brought into the immediate possession of the United States of America?

A. There is,—definitely.

Q. Would you explain that to the Court, please.

A. Well, for two reasons primarily; one from the sabotage angle which is now planned and being put into effect that the entire government owned reservation be surrounded with a fenced enclosure.

(Testimony of Harry T. Meyers.)

There is now constructed and completed and will soon be put in use a gate-house immediately north of the administration building, and building 34 at which it is planned to divert all pedestrian traffic and employees through turnstiles at this gate-house so that the only pedestrian entrance to the properties will be through guarded turnstiles.

There will be other truck entrances, for entrances to the piers, that will be under rigid military guard.

At the present time the location of other than government agencies on this property constitutes a definite fire hazard. It so happens that in addition to [32] my other duties I am Port Fire Marshal and responsible for the fire protection. This building and property is located in the center of the Port of Embarkation installation and is not under our control for supervision of fire hazards. We have no control over the types of supplies that are put into this property that may constitute fire hazards. It has already been shown that it is a fire hazard.

In fact, since we have been on the property they have had fires in the building. One of them occurred in the sugar storage area, I understand. I was there and witnessed the fire department in action in putting out the fire.

The building is located immediately adjoining a government owned building and adjacent to the pier aprons of the new pier "D", approximately less than 50 to 75 feet from the wood constructed pier apron in front of the new pier "D" which

(Testimony of Harry T. Meyers.)

would definitely be a hazard to the pier and cargo stored in adjoining area in the event a serious fire occurred in this structure now occupied by the Merchants Transfer.

The government has a permit from the city to use the western end of Connecticut street. It has been protected by a gate and a fence which has been recently removed for the purpose of construction in pier "D". It is desired that upon acquisition of control of the entire properties that this fence be placed along Alaska Way to cut off the whole of Connecticut street west of Alaskan Way. So that the property within that area could be secured and under guard upon the west side of Alaskan [33] Way.

Q. Major, are you familiar with the uses to which it is proposed that the United States of America will put the subject property, being the property being taken,—the use of which is being taken in this condemnation action?

A. I am.

Q. What are generally the proposed uses to which it will be put?

A. Well, generally at the present time all uses of structures within the port area are subject to change to meet the mission of the port. At the present time it is planned that the first floor of this building will be used for certain offices of the divisions occupying the structure and ships stores; the majority of the first being used for ships stores.

(Testimony of Harry T. Meyers.)

Q. Where are those ships stores now being stored?

A. They are now being stored in building number 7 which is at the corner of South Alaskan Way and Massachusetts Street on the northwest corner.

Q. Which property was that when it was under private ownership?

A. It was a portion of the property under Pacific Steamship Terminal.

Q. Do you need that space now being used for ships stores for any other purpose?

A. That space now being occupied, building 7, for ships stores, is needed for transit storage for which the rest of the building is being used.

Q. Just what do you mean by transit storage?

[34]

A. That is the receipt of freight and cargo items that may be received in carload lots with freight designated for several destinations overseas. It may be received by motor freight. It may be received by government transportation. The freight is unloaded in this warehouse building, broken down into cargo designated for certain destinations and held until it is necessary to be placed on the pier sheds or docks for loading aboard ships.

Q. And do I correctly understand that the increased volume of traffic due to the war developments in the Pacific requires that this space in building number 7, which has been used for ships stores, requires that it be used for transit stores?

A. That is correct.

(Testimony of Harry T. Meyers.)

Q. And that other available space will be needed for ships stores? A. That is correct.

Q. Major, you started to enumerate the purposes for which the subject property would be used. You mentioned just the——

A. It is planned at the present time that the floors above and in the basement of the structure be used for storage of supplies and materials and equipment incident to the operations of the marine repair shop which is charged with the responsibility of repairing transports and ships while in port.

Q. Will you explain how those repairs are carried on, particularly with reference to loading operations?

A. The main mission of the Port is, of course, to ship cargo and troops and equipment. The success of that mission [35] depends upon how rapid and how efficient those movements,—vessel movements can be made, in reducing the turn-around time of vessels between overseas ports and this port

In order to reduce that turn-around time, the Port has established a marine repair shop within the property in order that repairs can be accomplished on ships that do not require dry docking while being berthed at the Port piers.

Those repairs are accomplished while cargo is being discharged and loaded in many instances. It is necessary in accomplishing these repairs that the supplies, materials and equipment they need for the repairs be immediately available.

(Testimony of Harry T. Meyers.)

There is also a small drydock being installed on the north side of pier "C" designated on the map or immediately west of the marine repair shop, so that repairs on smaller vessels can be accomplished there while being drydocked.

The Court: May I ask him a question?

Mr. Falk: Surely.

Q. (By the Court) What dock in Seattle at which many ships or any considerable number of ships berth is there maintained a storage warehouse apart from the dock to warehouse ships stores and repair parts for ships; do you know of any place like that in Seattle where the situation is comparable to the situation the government seeks to bring about by reason of this condemnation?

A. Not any commercial piers, no, sir.

Q. Name some outstanding pier in Seattle where a great number [36] of vessels regularly berth and where repairs are made upon the ships instead of sending them to drydock. Do you know of any such outstanding pier in Seattle?

A. Well, pier 40 and 41, a navy installation.

Q. Well, before the navy installed theirs, before the navy took possession by condemnation proceedings there, was there any arrangement for warehousing and storage of ships parts, repair parts or ships stores apart from the docks themselves?

A. I am not familiar with it.

Q. Can you name any large pier in Seattle or any pier in Seattle where as a part of the enterprise of servicing the ships that berth there, there

(Testimony of Harry T. Meyers.)

is maintained apart from the dock facilities any warehousing or storage facilities to especially accommodate ship repair parts and ships stores?

A. Well, I am not familiar with any other piers except the government-owned.

Q. Do you know anything about the Alaska piers? A. No, sir, I don't.

Q. Or the East Waterway warehouse?

A. Ames Terminal.

Q. Ames Terminal?

A. Ames Terminal have facilities there.

Q. Is it separate from the dock and storage facilities?

A. They have separate buildings that I understand were used for repair purposes.

Q. I wonder how the Alaska Steamship Company manages current and small repair jobs on ships berthing at their piers, do you know? [37]

A. I don't know.

Q. Do you know whether or not they possibly carry in storage on the docks repair parts for the ships? A. I do not.

Q. Do you know whether possibly with such facilities as they have at the dock they may make temporary or small repairs aboard ship while the ships berth at the piers instead of sending ships to drydock?

A. They may make them right there. As I say, it is quite possible they could make them.

Q. Isn't it possible to store on the docks under

(Testimony of Harry T. Meyers.)

the dock sheds, where the ships berth, ordinary ships stores without having a warehouse for that?

A. It is possible. But it is not the practice at a port of embarkation to store anything but in-transit storage in pier sheds. The reason for that is that the mission of the pier and cargo operation has to remain elastic so that in the event of emergency movements or shipments the cargo necessary for that shipment or shipments might be accommodated on the pier or pier sheds or immediately in open storage in front of the pier sheds.

Q. (By Mr. Falk) Major, had you finished covering the various uses to which this new building would be put?

A. Well, in general that is the two main uses to which the building will be put.

Now, the types of supplies, I might elaborate on the types of supplies. It does not necessarily mean that the entire upper floors are going to be full of fittings or pipe or steel. There are thousands of types of supplies necessary for ships' repairs.

[38]

The weights vary from gaskets and packing on up to steel plate. There are electrical supplies, various types of communication supplies. And the purposes for which these floors will be used for storage will be controlled to the supplies for which the floors are suitable and designed for.

Q. Will the materials stored in the building be the type which could be stored outside, so-called open storage?

(Testimony of Harry T. Meyers.)

A. Generally the supplies stored under coverage are those which would be damaged by the weather or deteriorated rapidly under weather conditions.

Q. Major, in the area covered by the Seattle Port of Embarkation as depicted on petitioner's exhibit 2, is there any vacant space for which plans have not been made? A. There is not.

Q. During the period you have been with the Port of Embarkation have you had any contact with Mr. Horner or any other representative of the Merchants Transfer and Storage Company with respect to this space?

A. Well, in June, 1942, it was determined by the Commanding Officer of the Port that properties,—additional properties would be required. And about that time in June we made a first request to the real estate branch of the War Department by accomplishing a form for the acquisition of the properties which the Merchants Transfer Company was a part of.

At that time Colonel Marshburn, who was then the transportation officer and is now the Port Quartermaster, and I went through the building with Mr. Horner who very graciously showed us through and cooperated with us very [39] well in letting us establish an air raid shelter within the building and first aid facilities.

At that time Colonel Marshburn informed Mr. Horner that the government was in need of additional properties and was making a request for acquisition of Merchants Transfer's building.

(Testimony of Harry T. Meyers.)

He was also told that if certain other leased properties were approved and acquired by the government that it may not be necessary that they take immediate possession of this building. One of those properties was the Goodrich building which we later were given permission to occupy. Another property was the Hines building on Atlantic street and Utah. Another property that was later acquired was the Henry Building on First Avenue South between Atlantic and Connecticut streets. Another property was the Moran building adjoining the Henry Building which was acquired.

Both those properties, the Moran and Henry buildings, were warehouse space. The Goodrich building was warehouse space and was used for that purpose after we immediately acquired it.

All of these properties were less desirable than the Merchants Transfer building as far as accomplishing the mission of the Port was concerned.

The Henry building and the Moran building was across First Avenue and meant that any storage of or use of that building we would have to fight the traffic on First Avenue, Alaskan Way, and the railroad traffic which we wouldn't have to fight if we had the Merchants Transfer building. [40]

So the government and the Port did everything in its power to utilize all available space within the area without disrupting the function of the Merchants Transfer building until it became essential by the Secretary of War that it was now necessary

(Testimony of Harry T. Meyers.)

that this property be acquired and for the mission of the Port.

The details of the mission of the Port is not for us to determine. The Secretary of War knows the war plans and the mission of the war program. We are planning the Port mission to conform with the wishes of the War Department.

Q. This Henry building was the building that was occupied by the Reliable Transfer and Storage,—a portion of it was?

A. That is correct.

Mr. Falk: May it please the Court, that was condemnation under action,—I believe number 705 of this Court.

Q. (By Mr. Falk) And the Henry and the Moran buildings are both being used by the government at this time? A. That is correct.

Q. And you will continue to use them?

A. That is correct.

Q. And you will need these facilities of the Merchants Storage in addition to these other facilities that you now already have?

A. That is correct.

Q. Did you have any other contacts with the Merchants Transfer and Storage subsequent to the one you referred to? [41]

A. Not personally. Since that day I haven't been in the building.

Q. During the earlier hearings there was some implication as to vacant space on the property,—well, it would be in the northerly section of the map

(Testimony of Harry T. Meyers.)

there, immediately to the west of which pier "D" I believe is being constructed. Can you explain whether or not any vacant space there could be utilized?

A. There is no vacant space within the Port area that could be utilized for any other purpose.

In order to find space for a fire station we are now contemplating it is now necessary to move this gas station at the corner of Connecticut street and Alaskan Way. We feel that a fire station is more essential than a gas station.

We have been trying to locate facilities to feed colored and white troops now at the Port. There is no additional space that could be utilized for that purpose as all the other open areas are necessary for open cargo storage. It is necessary that open space be available for storage of articles and equipment which can not be placed within the pier shed prior to trans-shipment. These spaces are sometimes vacant for periods of time between shipments or movements from this Port. At other times every inch of available space is used for accumulation of cargo from construction materials and building materials to trucks, guns, tanks and equipment of all kinds used in military maneuvers.

The space in front of the piers, in front of the new pier "D" and "E", a good portion of that will be [42] utilized for spur tracks serving these piers. The areas between the spur tracks will be used for open cargo storage.

(Testimony of Harry T. Meyers.)

Q. Have you any idea, Major, what length of time it would take to move the property which is in the Merchants Storage and Transfer building out from that building?

A. Any statement I would make would be on how fast the government and War Department could move it. I think Mr. Horner said he did one million tons, or million pounds of business during the month of June.

Q. I think that was one item.

A. If he had to move 10,000 tons, it would take him——

Q. Major, in your opinion could this property be moved out of that building by August 31st?

A. I would say that the War Department could move it out of there by August 31st. I don't know what organization Mr. Horner has to move it. But if the amount of material he said he moved in the month of June was moved through his warehouse, he could easily move the 10,000 tons out between now and the end of the month.

Mr. Falk: You may cross examine.

Cross Examination

By Mr. Stedman:

Q. Major Meyers, did you have any negotiations with the owner of this building as to the acquisition of it? A. The Merchants Transfer building?

Q. Yes.

A. I had no contact with the owner.

Q. Do you know, as a matter of fact, that the

(Testimony of Harry T. Meyers.)

government did [43] have an option on the purchase of the building subject to the lease?

A. Those real estate matters are handled through the real estate office.

Q. You had no personal dealings with the owner?

A. Not with the owner, no, sir.

Q. No contacts with him?

A. No contacts with him.

Mr. Stedman: No further questions.

Cross Examination

By Mr. Griffin:

Q. I gather from the entire testimony that the taking of this property is vital to the War Department at the present time and the plans of the Port of Embarkation? A. That is correct.

Q. That being the case, and considering your testimony as to the location of this property and the necessity of the taking, why is the taking of the lease only and not of the property, itself?

Mr. Falk: May it please the Court, I think that is entirely beside the issue of this hearing as to whether the government takes the use of the property or takes the title is a matter for the Secretary of War to determine. The government objects to the question on the ground it is irrelevant and immaterial. Furthermore, that it is not the province of this witness to determine that.

The Court: Do you wish to state the purpose, —what you seek to prove or what issue this question bears [44] upon?

(Testimony of Harry T. Meyers.)

Mr. Griffin: It bears upon the arbitrary and capricious action of the government.

The Court: Objection overruled.

Mr. Falk: Furthermore, that it is not proper cross examination.

The Court: The objection is overruled.

A. My answer to that would be that the Secretary of War determines the method of acquisition of the properties.

Q. (By Mr. Griffin): As far as the acquisition of this property is concerned, are you relying upon any written document or directive from the Secretary of War other than,—may I have the original file, if your Honor please—I don't know whether this is called a directive—I called it a letter to begin with—of July 29, 1943, which I find in the original file in this action, marked "Filed August 2, 1943"?

A. You say, am I relying upon any information?

Q. Any other written document from the Secretary of War in so far as this particular taking is concerned, other than this document?

A. That the property is necessary for the government?

Q. Yes, any other written authorization from the Secretary of War?

A. I am relying that this in itself is sufficient. It says that the property is necessary for the vital success and prosecution of the war.

Q. By "this" you mean this letter from which you are reading of July 29, 1943?

(Testimony of Harry T. Meyers.)

A. That is correct. [45]

Q. Found in the original files, marked "August 2, 1943."

The Ames Terminal to which you referred, the government has a part of its facilities has it not?

A. Some branch of the government may have it. It is not under the Port of Embarkation.

Q. The Pacific Terminal Building you said was the first one that was taken?

A. Pacific Steamship.

Q. Pacific Steamship. That building had warehouse facilities that were turned into offices, didn't it, turned by the government into offices?

A. Offhand, I don't recall any warehouse space that was turned into offices.

Q. Are they using any warehouse space in that building now?

A. What building? There are several buildings.

Q. The original Pacific Terminal?

A. The property had approximately 12 buildings on it.

Q. Well, there was one,—before the Port of Embarkation—there was one main Pacific Terminal building that was used by the Pacific Terminal wasn't there?

A. There were four. There was the administrative building which is now the administrative building number one. That was their administrative building.

Q. Are any of those four buildings now being used for storage?

(Testimony of Harry T. Meyers.)

A. No, they are not; except cargo storage on pier "A", the pier shed,—not warehouse.

Q. How much warehouse storage space was in those buildings at the time you took them over, being used by the Pacific Terminals or had been used for storage? [46]

A. In those four buildings there was no space used for warehouse purposes. Pier "A" was used for cargo purposes and is now used for cargo purposes.

Q. Pier "D" which will be completed in August has how much floor space?

A. The exact quantity I don't know. It is about 900 feet long and 120 feet wide, the transit shed. The pier itself is longer.

Q. Carrying a load of what?

A. The loading capacity there,—I don't know the exact amount—it will be around 400 to 500 pounds.

Q. You spoke of taking over the A. M. Castle steel shed. That was a shed for the storage of steel wasn't it, in large quantities?

A. For the storage of steel and the cutting.

Q. That is what it was, was the shed?

A. That is right. It was a sheet metal and wood timber constructed building.

Q. The Port of Embarkation has the Stacy Street Terminal taken over from the Port Commission hasn't it?

A. That is correct.

(Testimony of Harry T. Meyers.)

Q. The storage load capacity in that terminal was 350 pounds, wasn't it? A. I don't know.

Q. You have converted that terminal and that space into office space, haven't you?

A. Not the Stacy Street pier nor the Lander Street pier. The warehouse between Stacy and Lander streets which is part of the terminal is being used by the District Engineer in Seattle for cargo inspections and traffic [47] control.

Q. And office space?

A. Generally office space.

Q. Generally office space.

The Court: Was it formerly used for warehouse space, storage space?

The Witness: The State Liquor Board had the warehouse in between, in the front end of Stacy street, there.

Q. (By Mr. Griffin): It was constructed as a storage warehouse wasn't it?

A. That was the intent of the building.

Q. And was so used up to the time you took it over?

A. It was used by the Liquor Board.

Q. I think you stated that you had established as far back as June of 1942 an Air Raid Shelter and First Aid Station in the Merchants Transfer building?

A. That is correct; some time around that date.

Q. It has been there ever since?

A. As far as the Air Raid Shelter is concerned,

(Testimony of Harry T. Meyers.)

they use it in the event of an air raid or air raid practice.

First Aid facilities, I have no knowledge of whether they have first aid equipment in there or not at the present time.

Q. Just briefly in reference to fire hazard, do you know any building in the city of Seattle that has any better fire equipment,—defense, if you want to use that term—construction throughout; I am not speaking of the construction of the building, but fire defense equipment, automatic sprinkler system theroughout,—any other [48] building in Seattle any better equipped than this one?

A. Well, it has a sprinkler system in it. Other than that,—as I say, I haven't been in it since one year ago this last June. I don't know what hand equipment they have in it. But it does have an automatic sprinkler system in it and I understand the A.D.T. have coverage over the building. But I will add this, that in comparison with the fire protection that the Port gives its buildings and the equipment we have in our building, that this building wouldn't begin to compare as a safe structure within the Port area.

Q. Well, the construction of the building itself is of wood is it not?

A. It is a mill constructed building with concrete walls.

Q. Whereas you have many buildings of concrete construction?

(Testimony of Harry T. Meyers.)

A. That is correct. We have many buildings of frame construction also.

Q. I said: You have many buildings of concrete construction? A. Yes. That is correct.

Q. Yes. The fire hazard is less in a concrete building than a frame building?

A. Certainly.

Q. Yes. The situation at least has been such that in the buildings taken over by the Port of Embarkation you have taken over warehouse buildings and transferred them or transformed them for other uses? A. Well, that is correct.

Mr. Griffin: That is all. [49]

Redirect Examination

By Mr. Falk:

Q. Major, do you have anything to add in explanation of your last answer?

A. In transforming these warehouse buildings to office space?

Q. Yes.

A. I will say this: That the alteration of and transformation of these buildings has been necessary to provide for offices and administrative functions for the Port of Embarkation for which no other facilities were available. A request for construction of a new office building was made to the War Department at one time, but it was determined by the War Department that it was more expedient and economical to convert warehouse space into essential offices than to use critical ma-

(Testimony of Harry T. Meyers.)

terials and the delay in construction time for building new facilities when the areas for new office space were not available in and adjacent to the Port area. They were required for other cargo operation purposes.

Q. (By the Court): Do you regard office space as indispensable to army business conduct?

A. Certain office space in connection with the cargo operations require their presence on the Port properties and are as essential as cargo.

Q. Is it more necessary in a place like Seattle than it is in the field of military operations; I mean on the battlefield for instance; how do they get along on the battlefield without an office?

A. They get along with tents or whatever facilities are [50] available.

Q. Do weather conditions affect that situation as to the need,—the indispensable need of office arrangements for the conduct of army business?

A. Well, it is essential within the city of Seattle, I would say, that the offices for administrative purposes be protected from the elements and provided with light and heat.

Q. Compare that with Alaska. Do you have offices and office buildings in Alaska for general Buckner and his administrative staff?

A. Well, fixed installations,—they have a certain amount of office space, yes, sir.

Q. Do they sometimes use tents or what they call huts?

A. Oh, they do.

(Testimony of Harry T. Meyers.)

Q. Do they ever use huts or temporary buildings as shelter? A. In tactical areas.

Q. Now in Seattle the weather is usually not very severe is it; wouldn't it permit the use of tents for office purposes?

A. Well, in an emergency you can use tents or whatever means are available.

Q. At Fort Lewis, Washington, do they use any tents at all for staff use?

A. Well, in the outlying organizations they may use tents for troop administrative use.

Q. The weather here, weather conditions, climatic conditions are supposed to be ideal for outside work of the army are they not?

A. I think that the military personnel wouldn't object [51] to the weather conditions and inadequate facilities for offices. When you are required to use civilian personnel for the majority of your administrative use and Port operations, your facilities have to be slightly better than that in order to get the civilian personnel to work for you.

Q. How do the conditions of need and of beneficial use of office space in an office building in this war condition compare with a similar need in the first world war, do you know?

A. I am not familiar with the needs of the first world war.

Q. Do you know the history of it with respect to the need for office buildings to carry on army business in Seattle?

A. Not in Seattle, no, sir.

(Testimony of Harry T. Meyers.)

The Court: Any other questions?

Q. (By Mr. Falk): Has the Port of Embarkation constructed any warehouse facilities, any new buildings on the Port site?

A. Since its acquisition?

Q. Since its acquisition?

A. Well, the first building was this large warehouse building designated as building 7 on the corner of Alaskan Way and Massachusetts street.

Q. What is the size of that building approximately, Major?

A. It has,—it is a three story structure of reinforced concrete and extends between 200 and 300 feet along Alaskan Way and more or less the same distance down Massachusetts street. It is an irregular shaped structure. That is now the building that is being used for transit storage. [52]

There has been a cold storage building constructed which has about 40,000 feet of cold storage immediately west of building number 7. There has been a small longshoremen's mess hall constructed west of building 7, along Massachusetts street.

The new pier "B" has been constructed in the old location of the Atlantic street "A" dock.

Immediately north of the administration building number 7 is a communications building which has been recently constructed.

Building 14, the structure formerly occupied by the Merchants Transfer Company has been completely renovated and remodeled for warehousing

(Testimony of Harry T. Meyers.)

and offices incident to warehousing of supplies required at the Port installation.

The old A. M. Castle steel shed has been completely remodeled for a marine repair shop.

The Court: You mean that is the present use, for marine repair?

The Witness: Marine repair shop. Yes, sir.

A. (Continuing): The present pier "C", the old Atlantic "B" of the Port of Seattle is now up for remodeling into an outfitting pier to be used in conjunction with marine repair shop, and equipped with an installation for the repair of ships and a 45-ton gantrey crane to be used in the repair of ships.

Mr. Falk: I believe Major Meyers has some photographs showing the present situation there and also showing the situation before the Port went into their possession. They are, of course, confidential and couldn't be [53] introduced in evidence but if the Court and Mr. Stedman and Mr. Griffin care to see them?

The Court: Do you care to look at those pictures?

Mr. Griffin: I do not.

The Court: The Court would not care to look at them unless all were willing.

Mr. Falk: I might state that I was familiar with the situation before the Port of Embarkation went in there and I was astonished at the changes and improvements and expansion that has taken place down there.

(Testimony of Harry T. Meyers.)

The Court: If you feel it is material and unless there is objection the Court will look at this suggested matter.

Mr. Falk: I can't state that I feel it is material because I feel that the position of the government is sound that we are entitled to the immediate possession of the property. The government has objected to any testimony along the line of that introduced by the respondents, therefore I could not state to your Honor that I feel it is material to the issues. It is the government's position that it is outside the issues. It is the government's position that it is outside of the issues.

The Court: As I understand the theory upon which the respondent has asked the Court to hear this testimony and the class of it that you were mentioning in your last statement, is that it goes to the question of good faith of the government and the question of whether or not the government was acting arbitrarily and capriciously in the taking of this limited lease date of one year on this [54] warehouse property, in view of all of the circumstances of warehouse space already controlled by the government and in view of the small amount of warehouse space available to civilian services.

It is my understanding that is the theory of the respondents offer of testimony along this line and on that theory the Court feels that it is admissible.

It is not merely that, assuming good faith and the lack of arbitrariness or lack of capriciousness on the part of the government, and a finding by the

(Testimony of Harry T. Meyers.)

proper department head on the question of necessity, would be binding upon the Court where you do have admitted good faith, absence of arbitrariness and capriciousness, the Court agrees with you that this case from Montana, decided recently by the 9th Circuit, whether you and I as individuals would agree with it or not, is binding upon this Court. But I feel that counsel for the respondents should be permitted to develop their theory of defense in this cause.

Mr. Falk: I do appreciate that, your Honor. I was merely making a suggestion as to the fact that Major Meyers had these photographs in the event your Honor was interested and that counsel desired your Honor to see them, because it does show the situation there. I think it has been fairly and accurately portrayed by the witness.

May it please the Court, at this time the government offers into evidence the letter that has been referred to from the Acting Secretary of War, Robert P. Patterson, dated July 29, 1943, which bears the stamp, [55] "Filed in the United States District Court, August 2, 1943."

(Letter dated July 29, 1943, marked for identification as Petitioner's exhibit 3.)

Mr. Falk: At this time the government requests that it be marked as Petitioner's exhibit 3 for identification and offers it in evidence.

Mr. Stedman: If the Court please, I object to it being offered in evidence because the statute gives

(Testimony of Harry T. Meyers.)

the Secretary of War certain authority. We are required to take notice that the Secretary of War is Mr. Stimson, and there is no showing that the Secretary of War was absent or disabled at the time this letter was executed.

Mr. Griffin: This respondent objects upon the ground and for the reason that it is incompetent, irrelevant, and immaterial, and more specifically that there is no such designated officer of the United States as the Acting Secretary of War, but specifically the statutes specify precisely that personnel of the War Department, in so far as the administrative agencies are concerned, and quite specifically there is no Acting Secretary of War.

There is by statute an Assistant Secretary of War; and there is by statute an Undersecretary of War.

Mr. Falk: Mr. Griffin, will you concede that Mr. Patterson is the Undersecretary of War?

Mr. Griffin: I will concede nothing as far as this case is concerned upon this offer.

Mr. Merrick: Counsel having examined the witness with reference to certain documents and it later being [56] offered in evidence, he is precluded from objecting to it. He has used it as evidence. It is highly technical but I think it is a true statement.

Mr. Stedman: He hasn't used it as evidence. I have not used it.

Mr. Merrick: That may be right.

The Court: Does the letter purport to be an official act of the Acting Secretary of War?

(Testimony of Harry T. Meyers.)

Mr. Merrick: Yes, it does, your Honor.

The Court: There is a recent statute passed by Congress about 1936 relating to the proof of public records. If counsel present or any one of them would remind the Court of the citation of it, if you have it?

Mr. Falk: I am inclined to think offhand that it is title 28, your Honor, but I wouldn't be absolutely certain. I wonder if your Honor wishes if we might have the bailiff bring title 28?

My recollection is as your Honor states that government official records are admissible under certain circumstances and that this particular letter comes within that category.

The Court: Mr. Holland, would you go to my chambers and ask Miss Coleman to send down the statute relating to the certified copies of public documents?

I will suspend the ruling on this, unless you wish to make a further statement on it and insist upon the Court ruling at this moment.

Mr. Falk: I make no such insistence, your Honor. I wanted to ask Major Meyers an additional question.

The Court: You may do that. [57]

Q. (By Mr. Falk): Will you state whether or not Robert P. Patterson is the Undersecretary of War?

Mr. Griffin: Objected to as not the best evidence.

The Court: Would you read the question, Mr. Reporter, please?

(Testimony of Harry T. Meyers.)

(Whereupon the last question was read as recorded.)

The Court: You might ask him whether or not he knows by reason of the conduct of his day to day business.

Q. (By Mr. Falk): In the conduct of your business with the United States Army, do you know who is the Undersecretary of War?

A. Well, it is my understanding that Robert Patterson is the Undersecretary of War from documents——

Mr. Stedman: I object if the Court please and move that the answer be stricken on the ground that the statement of the witness is a conclusion. He was asked if he knows a certain thing, which calls for a yes or no answer. His thoughts are a volunteered statement of his information on the stand.

The Court: Don't you think that your question called for a yes or no answer? Let him give such considerations as he may think are available to him by reason of the conduct of his business and the information gained by him in the conduct thereof. But his answer should be more specific than the one he gave.

That motion is granted. It is stricken. The Court will disregard it.

Q. (By Mr. Falk): In the course of your official duties are [58] you able to state who is the Undersecretary of War? That would call for either a yes or no answer, Major.

(Testimony of Harry T. Meyers.)

A. My answer would be no, because I have never seen the appointment papers making him Undersecretary of War. But I will state that I have seen——

Mr. Stedman: I will object to any further statement of the witness. He has answered the question.

The Court: Sustained.

Mr. Falk: May it please the Court, the government takes the position that the Court can and should take judicial notice of the fact that Mr. Patterson is the Undersecretary of War.

Mr. Griffin: I think as far as the respondent is concerned, this particular respondent, for the purpose of this record, that I will acquiesce if the Court will take judicial notice of a statutory office; to-wit the Undersecretary of War. By the same token he will take judicial notice that there is no such office as the Acting Secretary of War.

Mr. Falk: Do I understand, then, Mr. Griffin, that you concede, or do you concede that Mr. Patterson is the Undersecretary?

Mr. Griffin: I do not. My concession was that the Court would take judicial notice of a statutory office.

Mr. Falk: Very well. May it please the Court, there also has been filed in this cause a letter from the Attorney General. I wonder if I might have the Court's file?

May it please the Court, at this time the government asks to be marked as Petitioner's exhibit for identifica- [59] tion number 4, a letter from the

(Testimony of Harry T. Meyers.)

Department of Justice, dated August 30, 1943, to Mr. F. P. Keenan.

(Letter dated August 30, 1943, marked as Petitioner's exhibit number 4 for identification.)

Mr. Falk: May it please the Court, at this time the government offers into evidence petitioner's exhibit 4 for identification.

Mr. Stedman: I object to the introduction of this document into evidence if the Court please because on its fact it purports to be,—it recites "Having received a communication from the Acting Secretary of War." By statute I know of no such officer. The statute speaks of the Undersecretary of War who succeeds to the duty of the Secretary of War during his absence or disability. And during the Absence of the Undersecretary of War, the Assistant Secretary of War succeeds. There is no such statutory officer as the Acting Secretary of War. Therefore, I object to this.

Mr. Griffin: I make the same objection on behalf of this respondent. I call your Honor's attention that in two places in that letter, there, it is referred to the Acting Secretary of War, referring to this other document upon which you are reserving ruling.

No reference is made at all to the Assistant Secretary of War or Undersecretary of War, the only two statutory officers.

Mr. Merrick: May it please the Court——

(Testimony of Harry T. Meyers.)

The Court: What are you about to refer to now?

Mr. Merrick: Section 5, entitled,—Section 5 [60] and Title 5.

The Court: You mean Title 5, Section 5?

Mr. Merrick: Sections 4 and 5.

The Court: I have Section 5 and 6. Is there a volume called——

Mr. Falk: It is Titles 5 and 6, your Honor, included in the one volume.

Mr. Merrick: Right at the beginning of Section 4, Section 4 reads: “In the case of death, resignation, absence or sickness of the head of any department, the first or sole assistant thereof, unless otherwise directed by the President as directed in Section 6 of this Title, perform the duties of such head until a successor is appointed or until such absence or sickness shall cease.”

Under this Section there have been a number of judicial interpretations, all holding that the Court will take judicial notice of a public officer and that there is a presumption that an officer acting in the capacity, under the circumstances set forth under the statute, is acting legally.

In other words, the word “Acting Secretary of War” doesn’t make a lot of difference here. It only means that he is the Secretary of War ad interim, for the time being.

There is one case in 180 that was an appeal. “It will be presumed the contrary not appearing that the Acting Secretary was at the time lawfully exer-

(Testimony of Harry T. Meyers.)

cising the Secretary's powers and was authorized by this Section to do so."

Now, you will find in a decision by the United States Supreme Court, 109 U. S. 387, a document signed by [61] the first,—it says: "The signature of a first or sole assistant as the Acting Head of a department when attached to a document of that description of that department implies that one of the conditions implied in this section which authorizes him to act in that capacity had arisen."

In other words, when a document comes in to this Court or any other Court signed by the Acting Head of a statutory department, the Court takes notice of that department and presumes until the contrary appears that the man had authority to so act.

The Court: Now, that case is?

Mr. Merrick: 109, U.S., 387.

The Court: Will you let opposing counsel see that? You say that the Court must take judicial knowledge that the situation which comprises the condition of operation of the statute does exist by reason of the circumstance that the communication is written by one purporting to be the Acting Head of the department.

Mr. Merrick: Yes. In other words, there is a presumption that the thing has happened, devolving the duties upon him under the statute. That is only a presumption and it could be rebutted if there was any proof to the contrary. But the Court assumes that that is true if nothing appears to the contrary.

There are a large number of cases cited here.

(Testimony of Harry T. Meyers.)

We have read a number and there is nothing to the contrary that we have been able to find.

The Court: What is the page?

Mr. Griffin: Perhaps a more recent one on that, [62] however——

The Court: Just a moment, please, Mr. Griffin.

Mr. Merrick: Page 387.

The Court: And you read another one.

Mr. Merrick: 188 Federal, 350.

The Court: Is that on the same point?

Mr. Merrick: Yes. The case of Acting Head of a department, both cases are.

The Court: About the means of ascertaining the happening of the condition mentioned in the statute?

Mr. Merrick: Yes. "It will be presumed the contrary not appearing that the Acting Secretary was at the time lawfully exercising the Secretary's powers"—and that he was authorized to do so by this Section.

Here is a later case, 128, U. S., 50.

The Court: Now, Mr. Griffin, does your case hold to the same effect or does it hold to an opposite effect?

Mr. Griffin: Let's say it is analogous to this Section, rather than holding directly one way or the other upon it.

First, in as much as counsel is referring to cases already found in the notes to the Section itself, the one that I refer to is 135 Federal 2nd, page 196. It is an eighth circuit case condemnation, in which

(Testimony of Harry T. Meyers.)

the point raised below is that the action in condemnation must be taken in conjunction of one officer with another.

We are taking that same position here, when we get down to argument, that only the Secretary of War can act. The Court holds that that action is jurisdictional, having been raised below, subjects the cause to reversal [63] above and that the allegations of the petition are not in any wise assisted unless sustained by proof. I won't read it at this time but that is our position in that regard.

This case was cited in April of this year from the eighth circuit or determined in the eighth circuit at that time and so holds.

The Court: Will you allow counsel to see that?

Mr. Falk: As I recall the case, your Honor, it was under a special statute that required the action of two officials, the Postmaster General and the Administrator.

Mr. Griffin: That is right.

Mr. Falk: I might also call to counsel's attention *Marsh versus Nichols and Sheppard Company*, 128 U.S., at page 605.

The Court: Is that a different case from the 650 page? I wrote down 650 when Mr. Merrick was citing it.

Mr. Falk: I believe it should be 605, your Honor. And particularly to call your Honor's attention to the language at page 615, which reads as follows: "The signing of the instrument by Mr. Bell as Acting Secretary implies that one—(reads

(Testimony of Harry T. Meyers.)

section)—of the conditions on which he was authorized to act in that capacity had arisen. With his signature added, the instrument was complete. No other signature was required, the same person who signed it as Commissioner still continuing in office.”

I think the statement “The signing of the instrument by Mr. Bell as Acting Secretary implies that one of the conditions upon which he was authorized to act in [64] that capacity had arisen.”

Mr. Griffin: May I just state my position in that regard, or perhaps restate it?

Congress has been very specific in so far as the War Department is concerned, very specific to establish by Act of Congress the duties of the Secretary of War and by a separate Act or provision the duties of the Undersecretary of War. Then in reconsideration of the matter as evidenced by the date of the passage of the Act, by a separate Act entirely they designated an officer, an Assistant Secretary of War. The inclusion of the two excludes any Acting Secretary of War, under the very Acts of Congress that specify the office.

Mr. Merrick: If the Court please, we will take the case cited by Mr. Griffin. In that case one of the cabinet officers failed to function. Now, if he had functioned by an Acting Secretary I don't doubt but what the decision would have been different. But an Acting Secretary is acting in the capacity of Secretary. He is the Secretary. Normally and nominally he is the Undersecretary of

(Testimony of Harry T. Meyers.)

War. But if the Secretary of War should go to Europe or get sick and die he would step in there and call himself the Acting Secretary and under this statute he would have all of the powers that the Secretary has.

We have had Acting Presidents in this country. By courtesy we called them Presidents. When he is acting in that capacity he has all of the power and all of the authority under this statute. And it is a matter of right that the Secretary ought to have.

The Court: The Attorney General's opinions noted [65] here on page 14 of volume of the U. S. Code Annotated which includes titles 5 and 6, says that "When the Secretary is absent or sick, if the Assistant is in charge of the department," under this section he should sign as Acting Secretary.

Mr. Stedman: What is the section, your Honor?

The Court: That is under Section 4 on page 14, in the notes on page 14 of the volume which includes titles 5 and 6 of the U. S. Code.

It cites for that statement 19 opinions of the Attorney General, page 133.

The objections to petitioner's exhibit 3 and petitioner's exhibit 4 are overruled, and each of those exhibits is now admitted in evidence.

(Petitioner's exhibit 3 received in evidence.)

(Petitioner's exhibit 4 received in evidence.)

(Testimony of Harry T. Meyers.)

PETITIONER'S EXHIBIT No. 3

The Honorable,
The Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

It is necessary and advantageous to the interest of the United States that a leasehold interest in certain real property known as the Merchants Transfer and Storage Warehouse Company, Seattle, Washington, be acquired by the United States of America.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which acts authorize the acquisition of land for military or other war purposes, and the Act of Congress approved July 1, 1943 (Public Law 108—76th Congress), it is requested that you cause the necessary proceedings to be instituted for the condemnation of a term for years ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency at the election of the United States, notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term thereby taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or

(Testimony of Harry T. Meyers.)

extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The property to be acquired contains 43,355 square feet of land, more or less, and is more particularly described in the inclosed Exhibit "A" and is shown on the inclosed map. The lands are purportedly owned by Louis L. Stedman, Hoge Building, Seattle, Washington and Merchants Transfer and Storage Company, Seattle, Washington.

The Act of Congress approved July 1, 1943, *supra*, appropriated funds to acquire the lands under consideration.

The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), *supra*, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

Appraisal reports and title evidence are being obtained under the supervision of Lt. Col. M. J. O'Byrne, Division Real Estate Officer, Pacific Division, San Francisco Branch, Corps of Engineers, U.S.A., 351 California Street, San Francisco, California, and the probable date of availability of the appraisal reports and title evidence can be obtained

(Testimony of Harry T. Meyers.)

by your field representative from the Division Real Estate Officer. It is also requested that you instruct your local representative to furnish a copy of the petition direct to Lt. Col. M. J. O'Byrne at the above address.

Inclosed herewith are two additional copies of Exhibit "A" and two additional copies of the aforementioned map.

Sincerely yours,

(Signed) ROBERT P. PATTERSON

Acting Secretary of War.

2 Incls.

Exhibit "A" (in Trip.)

Map (3 copies)

Pursuant to T. 28 U.S. Code, Sec. 661, I certify this to be a true copy of the original record in this Department.

[Seal]

NORMAN M. LITTELL

Assistant Attorney General,
Lands Division, Department
of Justice

EXHIBIT "A"

Lot 4, Black's Replat of Portions of lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; Except the West 40 feet thereof; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the North production of the

(Testimony of Harry T. Meyers.)

East Line of said Lot 4 and a line parallel to said produced line and 10 feet West thereof, And

All of Lots 3, 5 and 6 and the West 40 feet of Lot 4, Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, according to plat thereof recorded in Volume 11 of Plats, page 10, records of said county; And

That portion of Lot 17, Block 368, Seattle Tide Lands, lying between the East line of Lot 3 produced North, and the West line of Lot 6 produced North, Except the portion thereof lying between the West line of said Lot 3 produced North and a line parallel to said produced line and 10 feet West thereof; And

That portion, if any of Lot 7 in said Black's Replat of Portions of Lots 18 and 19 of Block 368, Seattle Tide Lands, and of said Lot 17, Block 368, Seattle Tide Lands lying West of East line of Lot 7 produced North, and covered or occupied by a concrete building chiefly on Lots 5 and 6 of said Black's Replat.

All in King County, State of Washington, containing 43,355 square feet, more or less.

[Endorsed]: Filed Aug. 2, 1943.

(Testimony of Harry T. Meyers.)

PETITIONER'S EXHIBIT No. 4

Department of Justice
Washington, D. C.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number
RJL - HA
33-49-509
Air Mail

July 30, 1943

Mr. F. P. Keenan
Special Assistant to the
Attorney General
655 Skinner Building
Seattle 1, Washington

Dear Mr. Keenan:

Enclosed herewith you will find a certified and plain copy of a letter from the Acting Secretary of War dated July 29, 1943, in which he requests the institution of a condemnation proceeding to acquire a term for years in certain real property known as the Merchants Transfer and Storage Warehouse Company, Seattle, Washington. There are also enclosed an original and one copy of Exhibit "A," a description of the property, and two copies of a map showing the project site.

Will you please prepare and file a petition in condemnation and secure the entry of an order confirm-

(Testimony of Harry T. Meyers.)

ing possession pursuant to the Act of Congress of March 27, 1942. The Acting Secretary of War advises that the aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. Please advise the Department by wire the day and hour the petition is filed and the day fixed in the order of the court for the surrender of the property, together with the civil number assigned to this proceeding. Thereafter forward plain and certified copies of the petition and order of possession.

Please note that the estate to be acquired is a term for years ending June 30, 1944, extendible for yearly periods thereafter during the existing national emergency at the election of the United States, notice of which election shall be filed in the proceeding at least 30 days prior to the end of the term taken, or subsequent extensions thereof, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by, or for, the United States, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The property to be acquired contains 43,355 square feet of land, more or less, and is more particularly described in the enclosed Exhibit "A" and is shown on the enclosed map. The lands are purportedly owned by Louis L. Stedman, Hoge

(Testimony of Harry T. Meyers.)

Building, Seattle, Washington, and Merchants Transfer and Storage Company, Seattle, Washington.

The War Department advises that appraisal reports and title evidence are being obtained under the supervision of Lt. Col. M. J. O'Byrne, Division Real Estate Officer, Pacific Division, San Francisco Branch, Corps of Engineers, U. S. A., 351 California Street, San Francisco, California, and the probable date of availability of the appraisal reports and title evidence can be obtained by you from the Division Real Estate Officer. It is also requested that you furnish a copy of the petition direct to Lt. Col. M. J. O'Byrne at the above address.

Respectfully,

For the Attorney General

NORMAN M. LITTELL

Norman M. Littell

Assistant Attorney General

Enclosure

No. 824379

[Endorsed]: Filed Aug. 2, 1943.

Mr. Merrick: That is all of our testimony. Do you have any questions?

Mr. Griffin: Yes, I have.

Cross Examination

By Mr. Griffin:

Q. I understood you to testify that the Merchants Warehouse and Storage building that was

(Testimony of Harry T. Meyers.)

taken over two years ago had now been turned partially into offices, is that correct?

A. It contains offices in connection with the administration of the section and division occupying the storage area of the warehouse. [66]

Q. And that building was a warehouse building constructed up to the first two stories with stone, wasn't it?

A. It has stone for sidewalls and foundations.

Q. Load capacity of 350 to 400 on each floor?

A. The lower floors.

The Court: How did it compare in size with this building now in question here?

The Witness: Well, roughly, without checking it accurately, I would estimate that there is less than 50 percent of the square footage.

The Court: In that building as in this?

The Witness: In the former building as in this building in question.

Q. (By Mr. Griffin): As far as square footage is concerned, yes,—but as far as tonnage capacity is concerned, the first building had a greater tonnage capacity than the second is that not correct?

A. That I don't know. I never had occasion to figure it.

Mr. Griffin: That is all.

Mr. Merrick: That is all.

(Witness excused.)

Mr. Griffin: Respondent rests.

The Court: As I understand it, both of the respondents do now rest?

Mr. Stedman: Yes, your Honor.

The Court: Let the record show that.

Mr. Merrick: If it please the Court, the Petitioner at this time moves the Court for an order granting the United States immediate possession of the premises [67] described in the petition and in the testimony of the witnesses.

(Argument by Mr. Merrick on the above motion.)

(Argument by Mr. Stedman on the above motion.)

(Argument by Mr. Robinson on the above motion.)

(Final arguments made by counsel for petitioner and respondents.)

(Whereupon the following Oral Decision was pronounced by the Court:) [68]

CERTIFICATE

State of Washington,
County of King—ss.

I, Merritt G. Dyer, do hereby certify that I acted as the court reporter in the proceedings entitled "United States of America, Petitioner, versus 43,355 square feet of land, more or less, situate in King County, State of Washington; Merchants Transfer & Storage Company, a corporation; Skinner & Eddy Corporation, a corporation, et al, Respondents" being Number 781, held before the Honorable John C. Bowen, one of the judges of the Western District of Washington, Northern Di-

vision, beginning at 9:30 A.M. on August 7, 1943 and concluding at 1:30 P.M. on the same day, and did report in shorthand all the testimony and proceedings given and had during said trial; that thereafter I transcribed all of said testimony into typewriting as hereinabove set forth; that my shorthand notes of said testimony are full, true and accurate, and that the foregoing transcript of the testimony is a full, true and accurate transcript of my shorthand notes, and that the witnesses sworn at said proceedings did in fact testify as transcribed in said transcript of testimony, numbered from 1 to 68 inclusive, preceding this certificate.

Dated at Seattle, Washington, this 25th day of September, 1943.

MERRITT G. DYER

Court Reporter

[Endorsed]: Filed Oct. 4, 1943. [69]

[Title of District Court and Cause.]

Be It Remembered, that the above entitled matter came on for hearing before the Honorable John C. Bowen, Judge of the above entitled Court, Saturday, August 7, 1943, at 9:00 a.m.

COURT'S ORAL DECISION

The Court: Was there anything else that needs to be said by anyone that has been overlooked?

I think the interests of all concerned strongly indicate that the Court's decision in this matter should be promptly made. All connected with the case of course will recognize an oral decision will not be in form as good as the Court would like to have it. But the public interest in this matter and the interests of all the litigants seem to me to require that the Court at least announce the Court's decision.

The first point, it seems to me, to require consideration by the Court is that one made by Respondents (through Mr. Griffin) that the Acting Secretary of War was not shown to have authority to initiate these proceedings in [1*] the manner that has been done. I am however of the opinion that the statutes cited and relied upon by the Government do authorize the Acting Secretary to institute these proceedings and that this act of the Acting Secretary, Mr. Patterson, is sufficiently shown to be authorized and that the same is in fact authorized and that the objections of the Respondents upon that ground should be and are overruled.

As contended by Petitioner, the Court is of the opinion that the case of the United States vs. State of Montana reported in 134 Fed. 2d Series beginning at page 194 is authority for the principle or rule of law that when the Government Department

* Page numbering appearing at foot of page of Oral Decision.

through its proper official such as the War Department in good faith determines and finds necessary that the Government acquire by condemnation a certain piece of property owned by a citizen, that such determination is binding upon this Court. The Second War Powers Act gives the Department heads in connection with the condemnation the right, as a preliminary and advance step in the proceeding, to, under the conditions stated by that statute, obtain possession for the Government before the Government takes title to the property, but in my opinion it is required that the Government proceed in good faith, constructive good faith as well as good faith in fact, and that the proceeding be not arbitrary or capricious. And I think that this Court is required upon having that issue tendered to hear the testimony relating to it and to consider the issue and to determine the issue upon the evidence before the Court.

In that connection I want to say I now believe there was properly admitted certain evidence which was admitted over Petitioner's objection upon the ground announced by the Court that Respondents should thereby have the opportunity of making their record even though the evidence might [2] be properly excluded under the rule of *United States vs. Montana Supra*. I now believe such evidence was properly admitted under the issue raised by Respondents' contention of bad faith etc.,—an issue made clearer to the Court as the trial progressed. The Court as the trial progressed became more clearly aware of Respondents' theory

that the Petitioner has not exercised good faith but has acted arbitrarily and capriciously in selecting this property for condemnation and possessory proceedings.

If this proceeding had been instituted against this property as the first piece of property in this locality taken or to be possessed by the Government, and if the Government had shown the need of warehouse space for the handling and storage of army and navy ordnance, and army and navy supplies of all kinds, and before the Government acquired any other such space, or before the Government required any other such space which was anyway near adequate to meet its requirements, I am certain that the Court would have no difficulty in finding that the proceeding was in good faith.

The Court must consider all of the facts here shown. Among them the Court should consider and has considered the nature of the Government's property to be stored on these premises, whether that property is of such a nature as to indispensably require this particular space now; whether it could be just as well cared for out in the open in the weather, or whether it could be just as well cared for on some other premises; whether the facilities for storing it must be ideal from the standpoint of ventilation, care and custody; whether it needs constant attention or guarding against deterioration by action of the elements or the inherent nature of the goods themselves; whether the amount of other warehouse space in the vicinity of the property in [3] question already acquired by the Gov-

ernment is sufficient for the Government's present or reasonably prospective needs; whether such space of this kind as the Government has already acquired and now has control of is sufficient for its needs; whether the Government warehouse space already acquired in the vicinity is being efficiently used by the Government for that purpose or whether or not, after acquiring it, the Government has immediately converted its use to some other use so as to indicate that it wasn't warehouse space that the Government then needed or now needs, or whether the Government needs the space for some purpose other than warehousing and storing.

In connection with the consideration of the nature of the Government property, thought by the Government to need these facilities, we should consider the circumstances as shown by the evidence that it consists or is expected to consist of metal pipe, metal pipe fittings, metal ship repair parts, and ships stores; whether such property could be as well accommodated on premises now owned or controlled by the Government.

We should also consider, and the Court has, the emphasis laid by the Petitioner's witnesses on the development program at or near the Port of Embarkation in the vicinity of this property involved in this action such as the desire as expressed by these witnesses and concern on their part about proper policing and fire control of the Government's property in that vicinity as affected by this property here in question remaining without and not within the Government control. We should

consider whether or not the Government's action here is influenced by such a desire as that just mentioned, that the Government might find it more convenient to police and guard against fire hazards its property already [4] acquired if this property was also acquired; whether or not so far as policing and protecting against fire hazards are concerned, the public authorities which now have jurisdiction over this property can adequately deal with the situation; whether or not the situation of this property in its relationship with other property nearby which the Government already has acquired is in the nature of a mere remnant which, merely for purposes of policing and control as a whole, is an outstanding object in the Government's program, influencing the Government's determination to acquire this property.

We should also consider the circumstance of the convenience of the whole public as affected by the presence of the Army and its work in the community, and as affected by the presence of the civilian population, and as to whether or not the civilian population will really suffer in its services of necessary supply if this property should be withdrawn from such supply servicing to civilians. That as well as all of the foregoing it seems to me might very well have some bearing upon the Government's good faith in this proceeding.

I am not sure whether I have previously mentioned it or not but certainly the Court on this issue of good faith or arbitrary or capricious action

should consider the evidence that some of the warehouse space already acquired by the Government has been or is being converted into office space and usage and is not being used for warehouse and storage purposes as formerly, and as such space was used before it was acquired by the Government.

I think the Court ought to say that it believes that the evidence shows that such convenience is great on both sides, considering Seattle's Port of Embarkation and the movement of military supplies through that Port at this time. [5] I didn't mean in that statement to include the need of this specific property. I meant the need in the community which the civilians have with respect to this kind of a service and the need which the Army has with respect to this kind of a service.

If the Army didn't have any other warehouse space nearby or reasonably nearby, that would be an added fact favoring the Government's position which doesn't now exist. The truth is that the Army does have a lot of warehouse space nearby, and has had other warehouse space which has been converted to uses other than warehouse and storage uses.

The evidence is that so far as service to the civilian public is concerned, there isn't any other service which is comparable to this and that this warehouse and storage service is practically indispensable to the public.

I believe the Court could more easily resolve this question were it not for the circumstance that

part of the valuable warehouse and storage space used for storage before acquisition by the Government has, after acquisition by the Government, been converted to office space. That is a strong circumstance that naturally leads to the inquiry: What use, in fact, is the Government going to make of this space after it gets it; will it use it to store this iron pipe and metal pipe fittings and consumable ships stores or will it after days or weeks convert this warehouse to other purposes such as office uses? That inquiry might just as well be made as to this property now as it could have been made as to the other warehouse property before the government acquired it and converted it to office use. The evidence is undisputed that the former State Liquor Warehouse and the Russell Warehouse were actually converted into office uses after they were condemned by the Government during this war. [6]

Mr. Merrick: Could I interrupt the Court for a moment?

The Court: I would prefer that you would reserve your comment until the Court has completed announcing the Court's decision. After that is done I will be very glad to give you an opportunity to make any further statement you wish.

Upon a consideration of all of the evidence before the Court on this issue, I have no hesitancy in saying I do not believe that it is necessary for the war effort that the Government now acquire this warehouse as a place to store metal pipe, metal pipe fittings, metal repair parts for ships, and

ships consumable stores. Everyone knows that such property is customarily stored in any kind of a building. Some of it is stored outside. Some of those metal goods are often stored outside for a limited or longer period of time; and ships' consumable stores may be stored in any kind of a building that has a shelter over it such as docks and ordinarily is stored on any dock in Seattle.

So far as having these kinds of property, the metal pipe, pipe fittings and the ship repair parts, stored at a place where it can be used on a ship while it is lying at any berth,—for instance a berth at the Port of Embarkation—, there is no showing here that that is a situation any different than that attending private operation of ships.

The Court's view of the evidence might be strengthened from the standpoint of the good faith of the Government in taking this property and if the class or nature of the property to be stored in this place was something that had a peculiar need for the protection of this character of a building or possibly if it was Army or Navy Ordnance of some kind. Any kind of a building will house a pipe fitting or a metal pipe. [7] And a shelter of any kind, or sometimes no shelter at all for a limited time anyway, would be sufficient,—any place where it can be segregated and protected.

In making these observations and stating these findings and conclusions the Court does not say or imply that any particular officer of the Government or any particular military man has gone out with a deliberate attempt to act facetiously with

respect to the public generally. So far as I know each inspector and appraiser of this property may have done every act that he did in response to the order of some superior located in some other place.

The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man who may have made an appraisal or an inspection or a report. Rather the Court's conclusion is more the result of the Government's past action in converting good warehouse space into office uses, and of the possibility that in view of past acts in respect to similar property the Government may change its program as to this property tomorrow.

I want to say at this point that the contention made by Counsel for the Respondents, in effect that we should consider the future financial welfare of the Respondents, offers no criterion by which to determine whether or not the Government may in good faith condemn these respondents' property for a Government use. As observed by Counsel for the Government, the property of all citizens is held subject to the paramount right to be in good faith condemned for a public use by the Government of the United States. And the fact that it may prove a hardship upon the owner of the property is no defense against the exercise by the Government of that paramount right of eminent domain. [8]

This evidence and all of the evidence in the record above discussed have been discussed by the Court in connection with this issue of whether or not the Government in fact or in law has in this proceeding acted capriciously and arbitrarily with respect to this particular piece of property. And the Court is of the opinion, and finds and concludes, that such action of the Government in this particular case, in the light of all of the evidence here introduced and above discussed, is capricious and is arbitrary, and therefore the Court declines to enter an order granting to the Government leave to take possession of this property as requested by the Government.

Mr. Merrick: May we have an exception, if the Court please?

The Court: Exception allowed.

Mr. Falk: Do I understand, if it please the Court, that the Court's decision is based upon the evidence as presented?

The Court: That is right.

Mr. Falk: And your Honor's interpretation thereon?

The Court: That is right.

Mr. Falk: I may be in error upon this but as I recall the testimony of Col. Watson was in regard to the pipes and so forth which were the portions only which came within his jurisdiction.

It was my understanding from Major Meyers' testimony that Col. Watson's branch was only to occupy a small portion of the building. I would like to ask leave to recall Major Meyers to the

stand to testify with reference to the specific purposes to which this building was to be put.

It is my understanding that it is not pipe or material of any other kind or character that could be stored [9] in the open. At this time the Government asks leave to reopen and recall Major Meyers to the stand to make a further showing as to the use to which this property will be put.

The Court: Of course, Counsel on both sides are aware that if this request be granted the Court should grant to Counsel on the other side additional time to present more evidence should they desire it.

Do you wish to bring on such consequences?

Mr. Falk: Yes, your Honor, if there was any testimony that they could produce in rebuttal. It seems to me that the showing has been made that they need the space for one purpose.

The Court: It seems to be only fair that a corresponding right be given to the parties to produce rebuttal testimony if they so desire.

Mr. Falk: I think so, your Honor. I believe they have witnesses who were here this morning. This is the date to which the hearing was continued. It is the same date. There is no prejudice whether this testimony had gone in before your Honor's ruling or after your Honor's ruling. It is a question of fact and either my understanding or the inferences that your Honor has drawn from the testimony, there appears to be a divergence between the two. I recall Col. Watson's testimony. I think he testified in portion as your Honor has

suggested. But as to the use of only a small portion of the building.

I would like to have Major Meyers testify as to what portion of the building would be used for Col. Watson's branch and what portion would be used for other branches.

There is also the question of the use of this Lander Street. It seems to me that is entirely beyond the point. [10]

I would also like to call Mr. Mullane to the stand to testify with reference to that use.

It seems to me that we have a war situation here. This is an emergency.

The Court: Why, of course, if you gentlemen on both sides want to further try the case Monday afternoon, after I get through with another matter, the Court might further consider such desire. If both sides want to continue the trial I will hear testimony as long as you think there is material testimony available. I understood that both sides had submitted the case and were willing to abide by the Court's decision upon such evidence as has been introduced up to this time. That was my understanding. You shouldn't submit the case until all of the evidence is in, Mr. Falk. Of course, the Court wishes in a matter of this sort to have all of the evidence.

But I wonder if the other side might not wish to be consulted on the question of whether they have any objections or not.

Mr. Griffin: In behalf of my Respondent I object to reopening the case, and I do it with this

reason: I appreciate your Honor has full discretion in that regard. But the Government introduced its evidence and rested. If you will recall, in rebuttal I made no objection of any kind to the evidence that the Government was introducing, although sitting here as a lawyer I didn't consider it was rebuttal at all. It was part of their case in chief. But I figured your Honor was entitled to hear whatever the officers had to offer. The case having been tried that way, and now simply because the decision—after everybody had rested and full argument made—I didn't even argue the matter because when the matter is tried to the Court which has experience in these matters I don't argue it unless the Court wants it. [11]

I think the case was fully tried and completed. If it is to be reopened it means a retrial. Because your Honor having stated your views, in your opinion, I will feel impelled to obtain additional testimony to sustain the position that your Honor has taken in this matter. I cannot see any advantage, so far as substantial justice is concerned, in retrying the case which has now been tried for parts of three days. I object to reopening it.

Mr. Stedman: I adhere to what Mr. Griffin has said. Furthermore, the Government has only offered to give additional evidence on subjects that have already been gone into. And when Major Meyers was on the stand he testified on the subject that Mr. Falk wishes to requestion him about. My recollection is that he went into that subject in

considerable detail, and there is no necessity for having additional statements along the same lines by the same witnesses that have been before the Court.

The Court: I believe Mr. Merrick wanted to say something else.

Mr. Merrick: I thought your Honor was making a mistake and I was interrupting.

The Court: I daresay that most everyone who doesn't prevail in a situation may have a similar feeling at the moment.

Mr. Merrick: This should properly come up on the motion for new trial but as long as I have the floor and am talking informally,—your Honor made quite a point of the fact that this building was being taken and used for another purpose than that for which it was constructed.

The language contained in the letter by the Secretary of War is the language used in all of these cases, "Used for military supplies and for other military purposes, [12] and the utmost haste in the expediting of this." That is all there is to this case. All of this testimony is immaterial. But that is not your Honor's opinion.

But we take it for military purposes, a specific thing in mind, with the right,—and that right is granted by this Court in all the other cases—to use for any and all military purposes. Because you can't run a war from a courtroom, as your Honor knows.

The question raised by Mr. Falk,—Major Meyers did testify that this was to be used for storage

of ships parts and repairs, from everything from steel plates to the most delicate instruments. Those were his words and they are undisputed at all.

The Court: I do not wish to open up the argument again at this time, Mr. Merrick.

Mr. Merrick: I wanted to cover those two things.

The Court: I understand that your comment is the same kind that you made in your argument. Is there anything further that anybody wishes to say in connection with this taking of further testimony? I understood that was the question now before the Court.

Mr. Merrick: Well, we can furnish plenty of additional evidence as to the details of this storage and to show that a lot of it is incapable of being left out in the weather.

The Court: If I thought that enlargement of the scope of the evidence on that detail that you, Mr. Falk and Mr. Merrick, just then mentioned, would change the decision of the Court,—in other words, if I thought that your showing that the government wanted to store some sugar there would change the decision, I would be more inclined towards opening up the case for the purpose of introducing that additional testimony. [13]

But I am going to say to you frankly what I consider to be the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case, and in favor of the Respondent's position in this case, and that is that in two instances the Government has ac-

quired already in this neighborhood, and in one instance very near this property, at least two separate warehouse properties, and afterwards it converted them away from warehouse and storage use to office use. I get the impression from the evidence in this case, that the Government has been rather strong on acquiring property and using it for office use. That is the impression,—one impression that the evidence gives the Court in this case. I believe, gentlemen, that that is the evidence that is the most weighty of all in this case in influencing the Court's decision as announced.

So in view of the statements that have been made by Counsel seeking the opportunity of introducing further evidence as well as of Counsel opposed to that, and in view of the observations made by the Court, that request is denied.

I think what is needed here is an expression by an appellate court binding upon this Court as to whether or not this Court has any discretion to search into the issue of arbitrary and capricious action on the part of the Government in a case like this. I believe that the record now will squarely present that issue before any appellate court that might review it.

Mr. Merrick: I think perhaps this will be the first appeal under that possession statute of the Second War Powers Act, which might help everybody.

The Court: I believe so.

Mr. Falk: May we have an exception to the

Court's refusal to grant to the Government possession as of August 31st? [14]

The Court: The exception is allowed.

Mr. Falk: May I also have an exception to your Honor's refusal at this time to permit us to reopen the case to introduce further testimony which in my opinion would correct misconceptions your Honor has drawn from the evidence because I believe that the office space——

The Court: You have already made your argument. You are now only noting an exception?

Mr. Falk: ——was converted to office space rather than——

Mr. Merrick: I wish to file a proposed order.

The Court: Let that proposal be filed. Is it desired by those connected with the case that the matter be continued to a certain time to settle the form of order to be entered in this case?

Mr. Falk: Yes, your Honor, I feel that perhaps Monday should be fixed as the time for setting the order. Would your Honor's oral finding be sufficient for that purpose?

The Court: I should think that Counsel on both sides might wish to consider it further. I will say that I will continue the case until Monday afternoon at 3:00 o'clock for the purpose of settling the order or orders or other papers in the case.

Mr. Griffin: Will your Honor excuse me from appearing at that time? I have already made *plan* reservations for San Francisco and I figured this would be closed,—on another Government matter.

The Court: How long will you be gone, Mr. Griffin?

Mr. Griffin: I can't tell. I am going on another government project. I am only asking that I be excused because Mr. Robinson and Mr. Stedman can handle everything in my absence. [15]

The Court: I was thinking that the Court might need the benefit of your advice concerning your client's position as affected by the form of the order or papers to be entered. It is possible that there might be some diversity of views upon the form of any papers that might be proposed and I wonder if final action upon the matter might be facilitated by your presence.

Mr. Griffin: I hope to be back Wednesday by some time. I can get reservations down,—it is just down into southern Oregon. But coming back, travel is problematical and that is why I am indefinite about it. It will only take me a day down there. It is just the matter of getting back.

The Court: You expect to be there Tuesday?

Mr. Griffin: I expect to be there Tuesday and I hope to be back following that from Portland.

The Court: I think it would be better to have all Counsel present because it seems to be a case which both sides regard as important.

Don't you think it would be better if all Counsel in the case were present?

Mr. Stedman: I believe it would.

The Court: Those that have taken an active part in it, anyway. I think it would not be unreasonable to set it down Thursday morning, then, at a fairly

early hour, with the object mentioned of settling any orders or papers that may be desired by Counsel to conclude the case so that it may be put in final shape and accomplish this Court's completion of its work. So the matter is for that purpose continued to Thursday morning, August 12th, at 9:30.

(Concluded)

[Endorsed]: Filed Aug. 11, 1943. [16]

[Title of District Court and Cause.]

COURT'S OPINION RE: PLEA TO
JURISDICTION

The Court: The Court on August 11, 1943 originally filed its opinion in this case upon substantially the same questions here raised on this plea to jurisdiction. This Court at this time, after further considering this matter and after considering the forceful arguments of Counsel on both sides, is still of the same opinion and adheres to the same views which were expressed in that opinion filed August 11, 1943.

It might now be appropriately added that this Court is of the opinion that in time of war the civil power of the Government is supreme over the war powers of the Government.

I also cite the decision of the Circuit Court of Appeals for the Eighth Circuit in *Carmack vs. United States*, 135 Fed. (2d) 196, wherein the Court at page 200, paragraph [2-4], held that:

“While the Government as a sovereignty has inherent power to take private property essen-

tial to the public welfare, it exercises that power ordinarily pursuant to specific legislation. The right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, but whether in carrying out the purpose of Congress, the officer has acted capriciously or arbitrarily is a judicial question. (Citing). Necessity must be combined with a public use and a necessity for the public structure does not, in the circumstances here presented, imply a necessity for taking this particular property already devoted to a public purpose. That necessity was determined by the Acting Administrator of Federal Works Agency, and whether in determining the issue he acted arbitrarily or capriciously, should be decided by the trial court."

This Court believes that the opinion of the Eighth Circuit Court of Appeals in that case applies to the situation in the case before the Court here, where the Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Powers Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.

Upon the evidence adduced at the previous hearing, this Court was of the opinion that this warehouse property was in part used for the public

service. I think there was some evidence that about 10% of the warehouse space was reserved for the accommodation and service of the military forces, or public agencies. I am not going to discuss the details of all the evidence which was before the Court at the previous hearing on the merits on the Government's petition for immediate possession. I think it is proper to comment that in the previous proceedings the Government voluntarily appeared and filed its petition for, among other relief, immediate possession of this warehouse property. The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken. I believe the Constitution makes it plain that there goes with the right which the Government has to condemn private property for public use a duty to justly compensate the owner for it. Up to this time there has not been anything said or done nor has any step been taken by the Government for determining just compensation in this case.

In view of what the Court said in the opinion filed on August 11 and these further observations, the Court does now express the opinion that it does have jurisdiction over this phase of the matter and does now overrule the plea to the jurisdiction and does overrule the objections stated in that plea by the Government to the jurisdiction of the Court.

Mr. Littell: Exception, your Honor?

The Court: Exception allowed.

[Endorsed]: Filed Sept. 21, 1943.

[Title of District Court and Cause.]

COURT'S OPINION RE CONTEMPT
PROCEEDINGS

Be It Remembered, that heretofore and on, to-wit, the 20th day of September, 1943, at the hour of 2:30 p.m., the above entitled matter came on for hearing in the above entitled court, in Department No. 1 thereof, the Honorable John C. Bowen presiding.

Appearances:

Norman M. Littel, Assistant Attorney General; F. P. Keenan and Ernest Falk, Special Assistant Attorneys General, appearing for Petitioner.

Geo. Rummens, Tracy Griffen and Roy D. Robinson, Attorneys, appearing for Respondent Merchants Transfer & Storage Company.

Lewis L. Stedman, Attorney, appearing for Respondent Skinner & Eddy Corporation.

The Court: Are you gentlemen ready to submit this matter insofar as the questions involved up to now go?

Mr. Griffen: We are, sir.

The Court: I would like it to be understood that what the Court has said heretofore and says hereafter is with reference primarily to the Merchants Transfer & Storage Company, which was the tenant in possession of the property under a lease from the owner of the property at the time this proceeding was instituted by the Government. That party is the

one most vitally and immediately concerned other than the Government in this case.

As to the Secretary of War, the Under-Secretary of War, Major Tidemon, Jr., and Mr. Green, the order of August 13 did not command them either to do or not to do anything. They have not yet personally violated any order of the Court.

The order of the Court touching this matter reads as follows, quoting from the order of August 13:

“It is hereby ordered, adjudged and decreed that the motion for the entry of an order granting the Petitioner the right to immediate possession of the said premises be and the same is hereby denied.”

There is nothing in that language that orders any one of these natural persons to do or not to do any act. In the Court's opinion, therefore, they have not done anything forbidden by the Court and they cannot, having done whatever they may have done with respect to the possession of this property outside of the presence of the Court, in my opinion be now in contempt of this Court's process or order.

As to whether or not it is ever proper to enjoin a member of the Armed forces, any officer or member of the Army personnel, the Supreme Court, through Chief Justice Hughes, made some pertinent observations in the case of *Sterling v. Constantin*, 287 U.S. at page 403 of the report, in a paragraph or subject denominated by the Court as “fifth.” After discussing the principle which is really involved in the discussions of Counsel whether or not

it is properly now before the Court for application and decision, Chief Justice Hughes said,

“Whether or not the injured party is entitled to an injunction will depend upon equitable principles, upon the nature of the right invaded and the adequacy of the remedy at law.”

(Quoting from page 403 of the *Sterling* case *supra*.)

That case discusses this subject at great length and the language referred to is the most pertinent in my opinion and the Court will not take up further time in discussing it. The facts in that case were not on all fours with the facts here because there State officers rather than Federal were involved.

There is another case where this question is pointedly discussed as to whether or not an Army officer should be enjoined and that discussion will be found in the case of *Sheriff v. Turner* in 119 Fed. 782, a decision of the Circuit Court, Southern District of Iowa, decided in 1902 and the question involved there was whether or not a property owner whose property was about to be damaged by certain construction features in an Army camp that was being built and where the Army officer in charge of construction was responsible for the method of this particular phase of the construction, could have the Army officer enjoined from proceeding to the property owner's detriment and damage. That Federal Court held that such injunction should not issue and quoted an old case decided by Justice Bradley for

the Supreme Court of the United States, case of *James v. Campbell*, 104 U.S. 356, and the Iowa Federal Court quotes from Justice Bradley's opinion there as follows:

“The course adopted in the present case of instituting an action against a public officer, a public officer who acts for and in behalf of the Government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents except in a manner provided by law. We have heretofore expressed our views on this subject in *Carr v. United States*, 98 U.S. 433, where a judgment in ejectment against a Government agent was held to be no estoppel against the Government itself.”

Judge McPherson, speaking for the Iowa Circuit Court in 1902 in that case of *Sheriff v. Turner*, declined to enjoin the Army officer in charge of the construction of the camp from doing the alleged unlawful acts and particularly those acts alleged by the property owner to be without right, harmful and injurious to the private owner's property.

I think there is not any question in time of war about this when applied to Army officers. An Army officer has no discretion ordinarily in complying with the orders of his superiors. If the Court had before it the official, who, after the various consultations that doubtless were had in this case, came to the conclusion that the Government should take

immediate possession of it, the Court might have had a different viewpoint with respect to individuals. There is no showing of that. All there is here is a showing that certain individuals acting for the Army took possession of this warehouse property. If the Court had before it the person or official directing and responsible for the decision which directed the taking of possession, the Court might make some orders or entertain a request for some orders directing that person's future conduct with reference to it. The Court thinks in time of war that Army officers and those acting with them and only in official cooperation with them, should not be enjoined by this Court from carrying out the commands of their superiors.

A further reason I think so is that there is in my opinion in this case an adequate remedy at law against the United States. The United States, in the Court's opinion, has taken possession of this property without right. It has done so unlawfully, and I think that the United States should be made, in a proper proceeding, to respond in damages as for a contempt for failure to comply with the Court's order, if and when made, for the Government to return possession to those entitled to it. If the Court is wrong in that, it can be developed in a proceeding to ascertain the extent of such damages, for failure of the United States to return such possession. This procedure would result in at least establishing the moral obligation of the United States to protect the owner and save the owner harmless in respect to any damages which

may result as a result of the Government's failure to return possession.

In this decision by Judge McPherson you will find forceful statements by the Court, where it was observed that even though there might not be in some instances a speedy and in all respects adequate remedy in the hands of the property owner, there still would be raised a moral obligation on the part of the Government and those acting for it to do all possible, not only in dealing directly with the owner's property but in the future, to save the property owner harmless and likewise it could be expected that Congress, if there was any doubt about the authority of the United States to do the right thing by the property owner under present law, in the future would take such steps as would save the property owner harmless. So that irrespective of the question of valid service of the show cause order and even if you had all four of these natural persons before the Court here today, I don't think in this war time that there is any occasion for this Court issuing a mandatory injunction requiring these individuals, who have no discretion in this matter, to do or not to do anything, even if the Court had already entered an order calling upon them to do it. That is over and above the Court's statement at the outset that these natural persons have not violated any order of this Court. They have not done so. The taking of possession of this property, though, the Court repeats, by the United States, after this Court de-

nied its motion for leave to take possession, is contrary to the right of the property owner and it seems to me that if that is persisted in, will be the kind of an act which if done by a private person would justify the Court in adjudging contempt. I do not know whether the United States will continue in possession or not. If the Court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation. I do not know what it might wish to do. That is for the United States to decide, but upon a proper application, or upon proper motion therefor, this Court suggests that it will enter an order directing the United States to forthwith return this property to those who were in possession of it when the United States unlawfully took it.

Mt. Littell: May I ask a question, your Honor? Does your Honor make that statement now without reference to the fact that we are prepared to show in proof why this property is necessary in so far as the facts can be revealed without affecting the public's security adversely? We are prepared to go forward to the extent necessary and I don't quite understand your Honor's ruling, when the Government is already in possession. Is it a notice to the Government that we should get out of possession?

The Court: For the more particular information of Counsel on both sides, I will say that if

this matter were put in proper condition upon this record, the Court would order the United States to give up the possession.

Mr. Littell: On the basis of the facts already introduced in evidence?

The Court: Yes, that is right.

Mr. Griffen: If the Court please, following your Honor's suggestion, the order to show cause in furtherance of the ruling issued by your Honor on September 17 makes that very request.

The Court: I desired to have your response and your statement clarifies your position. I will hear anyone else's comment on that question.

Mr. Falk: May it please the Court, may we ask that Mr. Griffen's statement be read by the reporter?

The Court: The reporter will read Mr. Griffen's statement.

(Reporter reads previous statement by Mr. Griffen.)

Mr. Keenan: I might point out to your Honor that immediate possession was not taken. Almost 30 days intervened and that isn't immediate. Many things might have intervened in that time, military necessity here or something up in Kiska. I am sure no one came into this Court just before the Army took possession and notified the Court of the Army's need for this particular property. I think when the Court says "immediate," denies "immediate," he didn't deny possession at any time, and any time we would need it, again it is

a question of them needing it, we could come in 30 days after or 40 or 50, but if the situation changes so that 30 days having elapsed from the time the motion by the Government for immediate possession was not granted, the picture changes completely.

The Court: We will have a five-minute recess, after which we will proceed with this hearing.

(Short recess.)

Mr. Littell: If your Honor please, I am not wholly certain that I understand the full import of your Honor's decision at the conclusion just before intermission but if I do understand it and your Honor has said that the continuing of possession in the face of your order would be such an act as on the part of a private individual might be subject to contempt and that your Honor might find it necessary to take action impliedly by contempt should the Government continue in possession. I gather that I have stated your Honor's position.

The Court: I think that is a fair construction of it.

Mr. Littell: Then, your Honor, I must point out that that raises quite clearly the issue which I was unable to persuade your Honor of, that we have the war power of the Government in operation, maintaining a supply line to the Far East and Alaska, with which your Honor's decision, as I have now stated it, would most definitely and certainly interfere, or it would compel us—I mean the Government, the Army—to take other storage

space and create another situation. The fact of the matter is that the war power is being exercised by direction of the Secretary of War, that these officers are obeying the command of the Secretary of War, they are in possession of this property and I must state to the Court that they will continue in possession of the property. Then if the Court finds it appropriate in the exercise of its powers to either punish in contempt or seek to enjoin the United States from continuing in possession of this property, it will be necessary for us to seek a remedy for that decision on appeal, but I cannot stop, even if I wished,—I could not stop the war power of the Government in the exercise of this vital function of maintaining the supply line and of operating in this storage as it is bound to operate. In deference to the property owner, and for his convenience, he has not actually physically been removed; he has been prevented from putting more storage in and allowed to liquidate the storage he has there. That cannot go on indefinitely, in view of the mission of this area, of which I am aware.

The Court: Then I understand from what you say it may as well be understood so far as the record goes now the Government declines to give up possession which it has taken without the order of the Court and leaves the Court to make such order as it thinks it should make upon the record already before the Court?

Mr. Littell: That is the position of the Government.

The Court: The Court advises the parties and Counsel that it is of the opinion that upon this return to order to show cause the Court should enter an order requiring the Government to forthwith return this property to those in possession of it when the Government took it.

Mr. Littell: Exception.

The Court: And that for failure to do so the Government will be assessed as for contempt damages, to be ascertained by further hearings thereon. At such hearings consideration might be given to such damages as those entitled to possession will suffer from day to day during the time that the Government wrongfully withholds that possession.

I want to say in making this order that it is without prejudice to any right the Government may have to file either in this proceeding or in a new proceeding a declaration of taking with a deposit for just compensation.

Mr. Littell: May I comment, your Honor? I was unable to follow your Honor's comments now confirmed again by your comment as to the declaration of taking, in respect to the failure to provide for just compensation. That seems to make a great difference to the Court. Actually it makes no difference. The appropriation has been made for this property. The full faith and credit of the United States Government is pledged to pay the property owner for the property, just compensation as required by the Constitution. He is not without his remedies in full; the declaration of taking does not change that situation at all, it merely changes the

remedy whereby the Government acquires property and the amount of deposit in Court is to all intents and purposes, as far as the law is concerned, accomplished by the presence of appropriated funds already available for payment to this property owner. He is not without his remedy. He gets reimbursement in full for what has been taken from him.

Mr. Griffen: Would your Honor fix a time, say two o'clock tomorrow afternoon for presentation—

The Court: No, I cannot do it tomorrow.

Mr. Griffen: Will your Honor fix a time for presentation of the order?

The Court: Of this order?

Mr. Griffen: Yes, your Honor.

The Court: Yes.

Mr. Keenan: If the Court please, I am a little bit perplexed, I am completely out of my depth now. When is it contemplated that the Court is going to fix this day to day damage?

The Court: At such time as may be convenient to the parties and their Counsel.

Mr. Keenan: Well, is this a part of the trial on condemnation to award just compensation or is this a proceeding in the middle, or what are we dealing with?

The Court: I prefer you to place your own construction on it. I was not thinking of the necessity of giving it a name. I was merely indicating what I thought would be the proper procedure hereafter and I think the Court might particularize

by repeating what was said, that for failure of the Government to comply with the order to forthwith return the possession of the property, it will be liable to be assessed with damages as for contempt, to be determined hereafter.

Mr. Keenan: I am not sure that the record shows that we have an exception. May the record show that the Government has, your Honor?

The Court: Exception allowed.

Mr. Keenan: And the reason I asked the question was simply so when we come up here we will know whether we are coming up here on this sort of intermediate question or whether we have got to be prepared to prove value at that time.

The Court: All the Court meant, Mr. Keenan, or intended to mean, was proceedings to assess penalties and damages in favor of those entitled to damages as a legal remedy in lieu of injunctive relief, as for contempt.

Mr. Keenan: The reason I ask, of course, is that the United States Government would not produce any evidence on that, would stand on its rights.

Mr. Littell: Does the contempt proceedings contemplate individual contempt proceedings against the officers?

The Court: No. I said that for failure of the Government to return possession to those entitled to the possession of this property ordered by the Court, the Government would be liable to be assessed damages for the wrongful detention of the property, such damages to be hereafter determined,

and that that proceeding would be in the nature of a contempt proceeding against the Government of the United States.

Is there anything else?

Tomorrow afternoon, if that is agreeable to Counsel, it will be agreeable to the Court to settle this form of order.

Mr. Littell: I would much prefer it. I am leaving the next day, your Honor. If it could be possible, I would appreciate Counsel's—

Mr. Griffen: Two o'clock.

Mr. Littell: At two o'clock?

Mr. Griffen: Yes.

Mr. Littell: If that is agreeable to the Court.

The Court: That is agreeable. Any other matters to come before the Court at this time? The Court will now be adjourned until tomorrow at ten o'clock.

(Adjournment at 5:26 p.m. September 20, 1943.)

[Endorsed]: Filed Sept. 21, 1943.

[Title of District Court and Cause.]

DATE OF PROCEEDINGS:

OCTOBER 4, 1943

The Court: Do Counsel present have a recollection different from that of the trial judge in respect to the accuracy or substantial accuracy of this statement appearing on page 2, beginning at

line 28, of this re-write of the Court's Opinion re Plea to Jurisdiction:

"I think there was some evidence that about 10% of the warehouse space was reserved for the accommodation and service of the military forces, or public agencies."

Do any Counsel in the case disagree with the Court's recollection that that statement is justified by the evidence that was heard in open court?

Mr. Falk: I do not disagree with it, Your Honor, but I believe it is correct.

The Court: Does anyone else disagree with it?

Mr. Griffen: No, your Honor.

Mr. Falk: May I make one comment with reference to this, your Honor?

The Court: Yes.

Mr. Falk: On page 3 I notice your Honor's statement, I hadn't appreciated it when it was read before,

"The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken."

I believe the petition itself requests that the amount of just compensation be determined and that the persons entitled to it be determined.

The Court: But that was for something later. That wasn't in connection with the motion for immediate possession.

Mr. Falk: Well, that is true, your Honor.

The Court: That is what I had in mind.

Mr. Falk: And I would feel it is my duty to advise the Court of this further factor; I did not personally prepare the petition in condemnation but the last statute cited therein is an act approved July 1, 1943, Public Law 108, 78th Congress. I am inclined to believe that that is an appropriation act. I would be glad to check it and to advise the Court.

The Court: The point about it is this, that there are usually two phases to these proceedings. Where this immediate possession proceeding is had, it may be under a petition which Counsel filing it may have thought would be sufficient later on for some declaration of taking proceeding. I do not know what their attitude was, but usually in the possessory proceeding that part of it has been regarded as distinct from the declaration of taking proceeding. The possessory action, although apparently in counsel's mind coming in under the petition they hope covers both proceedings, does not take any steps to determine nor to have anything to do with just compensation.

Mr. Falk: Well, I thought that it was my duty, your Honor, to call to the Court's attention my belief that this statute is an appropriation act and——

The Court: That is agreeable.

Mr. Falk (Continuing): ——the portion of the prayer wherein we ask that the compensation be paid.

The Court: Your doing so is agreeable to the Court but I feel that the Court's statement, with the explanation made by the Court, is correct.

The further point about it is that one could file such petition with that prayer that you speak of in it, which might apply to the declaration of taking proceeding if and whenever that is taken, and the Government, after getting possession under one of these motions for immediate possession proceedings under the petition you speak of with the general prayer, might be quite content with the possession for a long time without taking any steps at all for determining just compensation. I think there have been one or two instances in this court of quite a period of time passing between the hearing on the motion for immediate possession and the hearing on the declaration of taking (which declaration of taking hearing usually occurs at the same time as the filing of the declaration of taking).

Mr. Falk: Your Honor's statement is entirely correct in that regard, but, as I understand the declaration of taking, it is primarily for the purpose of stopping interest running against the Government and the property owners have a right at any time to ask the cause be tried to determine just compensation.

The Court: I don't see how the parties could act if all there was before the Court was the motion for leave to take immediate possession, and where under this petition that you speak of with this general prayer for determining just compensation there

wasn't any step taken by the Government by which such determination could be made, such as depositing the estimated just compensation together with the declaration of taking.

Then let this Court's Opinion re Plea to Jurisdiction be filed in this case as of September 21, 1943, and I think it should take priority in time over the other Opinion that was filed on that date, which is denominated "Court's Opinion re Contempt Proceedings," and it is so ordered,—that in point of time it be regarded as being filed prior to such last mentioned opinion.

[Endorsed]: Filed Oct. 5, 1943.

[Title of District Court and Cause.]

CERTIFICATE OF JUDGE

I, John C. Bowen, one of the Judges in the United States District Court for the Western District of Washington, Northern Division, do hereby approve the foregoing Narrative Statement of Testimony Taken at Hearings on August 4, 1943 and August 5, 1943 and do hereby certify that the said Narrative Statement of Testimony, together with the Transcript of Testimony of the hearing on August 7, 1943, reported and transcribed by Merritt G. Dyer, Court Reporter, and certified to by him, containing 69 pages including the certificate, constitutes all the material testimony and proceedings given and had during the hearings on August 2, 4, 5, and 7 in con-

nection with the application of petitioner, United States of America, for entry of an order of immediate possession, and do further certify that the said Narrative Statement and Transcript of Testimony are full, true and accurate and that the witnesses sworn at said proceedings did, in fact, testify as set forth in said Narrative Statement and said Transcript of Testimony, and that the foregoing four opinions and decisions of the Court constitute all of the opinions and decisions of this Court on the merits of the matter in controversy.

Done in open court at Seattle, Wash., Oct. 5, 1943.

JOHN C. BOWEN,

United States District Judge.

We hereby approve the form and substance of the foregoing certificate before the entry of the same.

ERNEST FALK,

of Counsel for Petitioner,

LEWIS L. STEDMAN,

RUMMENS AND GRIFFIN,

of Counsel for Respondents.

[Endorsed]: Filed Oct. 5, 1943.

[Endorsed]: No. 10573. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, and King County, Washington, a municipal corporation, Appellees, and Merchants Transfer & Storage Company, a corporation, Skinner & Eddy Corporation, a corporation, and Lewis L. Stedman, Liquidating Trustee of Skinner and Eddy Shipbuilding Company, a dissolved corporation, Appellants, vs. United States of America and King County, Washington, a municipal corporation, Appellees. Transcript of Record. Upon Appeals from the District Court of the United States for the Western District of Washington, Northern Division.

Filed: November 15, 1943,

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10573

UNITED STATES OF AMERICA,

Petitioner,

v.

43,355 SQUARE FEET OF LAND, MORE OR
LESS, SITUATE IN KING COUNTY,
STATE OF WASHINGTON;

MERCHANTS TRANSFER & STORAGE COM-
PANY, a corporation;

SKINNER & EDDY CORPORATION, a corpora-
tion;

LEWIS L. STEDMAN, Liquidating Trustee of
Skinner and Eddy Shipbuilding Company, a
dissolved corporation;

KING COUNTY, WASHINGTON, a municipal
corporation, et al.,

Respondents.

CONCISE STATEMENT OF POINTS UPON
WHICH APPELLANT INTENDS TO RELY
ON APPEAL

The appellant, The United States of America,
makes the following concise statement of points on
which it intends to rely on appeal:

1. The trial court erred in overruling United
States of America's Plea to Jurisdiction.

2. The trial court erred in not holding that the United States of America was rightfully in possession of the premises involved.

3. The trial court erred in holding that the United States of America had taken possession of the condemned property unlawfully and without right, and contrary to the trial court's order of August 13, 1943.

4. The trial court erred in holding that there was an order that could have been violated by the United States of America.

5. The trial court erred in issuing a mandatory injunction against the sovereign, United States of America.

6. The trial court erred in decreeing that in the event said mandatory injunction was not obeyed, the sovereign, United States of America, would be assessed damages for contempt of court.

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F. P. KEENAN,

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Attorneys for Plaintiff-Appellant,
United States of America.

[Endorsed]: Filed Nov. 15, 1943.

No. 10573

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

MERCHANTS TRANSFER & STORAGE CO. ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

BRIEF FOR THE UNITED STATES

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FILED

MAR 13 1944

PAUL R. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10573

UNITED STATES OF AMERICA, APPELLANT

v.

MERCHANTS TRANSFER & STORAGE CO. ET AL., APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court's oral opinions denying an order of immediate possession and **Re: Plea to Jurisdiction** appear in the Record at pp. 177-186, 191-192 and 195-197, respectively. A revised form of these two opinions is published in 51 F. Supp. 905. The court's oral opinion **Re: Contempt Proceedings** appears in the Record at pp. 198-204, 208, 210, 211-215.

JURISDICTION

This is an appeal in a condemnation case from an order, entered September 21, 1943 (R. 51-52), requiring the United States forthwith to return to the condemnee possession of property, and providing that if upon entry of the order for the return of the property possession is not forthwith restored the United

States will be assessed as for contempt the amount of damages suffered by the condemnee from day to day while possession is withheld. Notice of appeal was filed September 27, 1943 (R. 55-56). The jurisdiction of the district court was invoked under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241 and April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171; the Act of March 27, 1942, 55 Stat. 177, 50 U. S. C. App. sec. 632 (Second War Powers Act, Title II); and the Act of July 1, 1943, Pub. No. 108, 78th Cong. The jurisdiction of this Court is invoked under sections 128 and 129 of the Judicial Code, 28 U. S. C. secs. 225 (a) and 227.

STATUTES INVOLVED

The pertinent provisions of the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257; of the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a; and of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App. sec. 632; are set out in the Appendix.

QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to order the United States to surrender possession of property under penalty of damages "as for contempt."

2. Whether the United States has authority under the Second War Powers Act to take possession of property when, in condemnation proceedings, the federal district court has denied a motion for an

order granting immediate possession of such property.

3. Whether the finding of the district court (that the determination of the Acting Secretary of War that the immediate possession of the property was necessary to the interest of the Government was arbitrary and capricious) is supported by evidence. And, if so,

4. Whether the court abused its discretion in denying leave to present additional evidence.

STATEMENT

On July 29, 1943, the Acting Secretary of War requested the Attorney General to institute proceedings to condemn a term for years in described property in Seattle, Washington (R. 155, 167-169). The request further stated (R. 168):

The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507—77th Congress), *supra*, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

Pursuant to this request, the Government's petition in condemnation was filed August 2, 1943 (R. 3-7). After referring to the Acting Secretary's request for immediate possession, the petition prayed that the condemnation be adjudged for public use, that the

court enter an order granting immediate possession, and that the compensation to be paid and the parties entitled thereto be ascertained and determined (R. 6-7). Two days later Merchants Transfer & Storage Company, the lessee of the property, moved to dismiss on the grounds, among others, that "The petition fails to show that public necessities can be served by such taking" (R. 11-12).

On August 4, 5, and 7, 1943, hearings were held on the request for an order of immediate possession. At the conclusion of the evidence, the court orally announced its opinion in which it concluded that immediate possession should not be granted (R. 177-195). Findings of fact and conclusions of law were entered on August 13, 1943, holding, in conformity with the views already expressed in the oral opinion, that the Government had acted arbitrarily and capriciously and that the taking of immediate possession was not a wartime necessity (R. 12-21). At the same time an order was entered denying the Government's motion for an order of possession (R. 21-22). The court did not, however, dismiss the petition in condemnation.

Thereafter, on September 8, 1943, officers of the Army took possession relying upon authority under the Second War Powers Act (R. 25, 30-32). The occupant of the premises—Merchants Company—was not ousted, but was permitted to liquidate the goods it had in storage, only being prevented from putting more goods in storage (R. 36, 207). Merchants and the owner of the property thereupon filed a petition "for rule and attachment in re: contempt," asking

that a rule and attachment issue for contempt against specified government officers and that possession be restored forthwith (R. 23-36). An order to show cause why such petition should not be granted was issued, and, as provided in the order, was served on the government officials by telegram and mail (R. 39-42). The Government filed a "plea to jurisdiction" (R. 43), and the officers each moved to quash and vacate the show cause order (R. 44-48).

Hearing was had on September 20, 1943, at which the court declined to take any action against the government officers but held otherwise as to the United States. Accordingly, the order appealed from was entered September 21, 1943 (R. 49-53). This order first denies the rule and attachment for contempt as to the individuals. It then orders the United States to vacate the premises and orders that if possession is not restored "then the United States of America will be later assessed as for contempt damages" (R. 52). Notice of appeal was filed on September 27, 1943 (R. 55-56) and on September 28, 1943, this Court entered its order staying operation of the order of September 21, 1943, pending this appeal.

The evidence produced at the hearing on August 4-7, 1943, and the views of the court as expressed at that time and at the subsequent hearings may be summarized as follows:

On August 4, 1943, the Government adduced the testimony of two witnesses, Lieutenant-Colonel Harry H. Watson, Supply Officer of the Army Transport Command, and J. Stanley Mullane, Associate Land Appraiser in the Seattle office of the Real Estate

Branch of the United States Army Engineers (R. 73-76). Watson described the property as a four-story frame building and part basement entirely surrounded by lands and other buildings already in possession of the Port of Embarkation. He said that the property was needed for the storage of military supplies, including repair parts for ships, such as pipes, castings, fittings, boiler plates, and other heavy metal objects and also various items used for outfitting and supplying vessels; that the Port of Embarkation had no storage space for such purposes; that the volume of military traffic through the Port was increasing rapidly; and that possession of the property would be absolutely required within the next thirty days. On cross-examination, in response to a question from the court, he also said that the pipes, castings, and fittings could be stored outside temporarily but not permanently. Mullane also testified that the property was entirely surrounded by property owned by the United States. On cross-examination, he said that a term for years ending June 30, 1944, was being taken because that date is the end of the fiscal year and Congress allots funds from year to year. Over objection by government counsel, he was permitted to state that he knew of no place to which Merchants Transfer & Storage Company could move. He further testified that there was no room in the Port of Embarkation for construction of additional buildings, particularly in the area of the warehouse in question.

The appellees first showed that in February, 1941, the premises had been leased to Merchants (R. 77-88).

They then put five witnesses on the stand, J. A. Clark, Seattle manager of the Parrot & Co., food brokers; A. E. Hullin, of the Hullin Transfer Company and president of the Washington State Warehousemen's Association; M. M. Houck, Assistant District Manager at Seattle of the Great Atlantic & Pacific Tea Co. and of Nakat Packing Co.; Leon H. Herkenrath, manager of a warehouse in Seattle; and Sam C. Horner, Secretary-Treasurer of the Merchants Transfer & Storage Company (R. 89-116). Clark said that without the warehouse facilities of the Merchants Transfer & Storage Company the U. & T. Sugar Company, which his firm of brokers represented, could not hope to deliver and supply the Seattle district with sugar. Hullin said he knew of no place Merchants Transfer could move to if it was required to vacate the building in question. Houck of the Great Atlantic & Pacific Tea Co. testified that he knew of no other warehouse that could take care of the business of his company in distribution of food supplies to the civilian population. Herkenrath said that he also knew of no place Merchants Transfer could move to. Horner of Merchants Transfer described the function of his company in regard to the storage and distribution of food supplies to the civilian population and armed forces and said no space was available elsewhere in Seattle to carry on the business. He also testified that although the Army had notified him in September of 1942 that the warehouse would be needed for Army use, it had not then been taken over. Other witnesses for Merchants Transfer testified to the lack

of available warehouse space to which the company could move, that no material was available for construction of a new warehouse, and that if there were it would take from four to five months for construction (R. 117-121).

Harry T. Meyers of the United States Army Engineers was called in rebuttal (R. 121-166). He testified that if the Army was not put in immediate possession of the warehouse, it would in his opinion materially impair the successful prosecution of the war effort; that the Goodrich warehouse which the Government had previously acquired had been used for transit storage but was being remodeled into office space; and that the warehouse in question was the last piece of property within the Port of Embarkation not owned by the Government, and it was important from the standpoint of sabotage prevention and fire protection that it be acquired and the whole Port enclosed by a fence and placed under rigid guard (R. 124-132). He also said that the main mission of the Port of Embarkation was to ship cargo, troops, and equipment, and that the success of that mission depended upon the rapid and efficient movement of vessels and upon reducing the turn-around time of vessels between overseas ports and the Port of Embarkation; that to reduce the turn-around time, a marine repair shop had to be maintained so that repairs could be made on ships that do not require drydocking while berthed at the Port; and that supplies must be kept immediately available for this repair work (R. 132-135). In response to questions from the court, he said that he knew of no commercial pier in Seattle which followed the same practice of

making repairs while ships were at berth; and that ordinary ship stores could be stored under pier sheds on the docks, but that, because the operations of the Port of Embarkation must be kept elastic, nothing but transit storage was placed in pier sheds on the docks there (R. 135-137). He further testified that the Government and the Port of Embarkation had done everything in its power to utilize all available space in the Port without disrupting the functions of the Merchants Transfer building until it became essential to do so, pointing out for over a period of a year the Government had been acquiring other properties but had left that building to the last; and that all available space in the Port was being efficiently used (R. 137-142). On cross-examination, over objection of Government counsel, he was asked why, if it was so essential to War Department to have this property, was the taking of the lease only and not of the property itself; and he replied that the Secretary of War had determined that (R. 143-145). He also stated that a warehouse previously taken over was being used generally for office space (R. 145-146). On re-direct examination, he explained that there was a shortage of critical materials for new construction and that the War Department determined it more expedient to convert warehouse space to essential office space (R. 149-151). Upon the conclusion of this witness' testimony, the Government moved for an order of immediate possession (R. 175).

Thereupon the court orally announced its opinion on the motions for dismissal and for immediate possession. It said that as the hearings progressed it be-

came clear that appellee's position was that the Government acted arbitrarily and capriciously in selecting the warehouse for condemnation and possessory proceedings; that in deciding this issue the court must consider all the facts and circumstances, including the relative necessities of the Army to have possession of the property for military purposes and of the civilian population to have it used for storage and distribution of food supplies and whether the warehouse space already acquired by the Army is being used efficiently or after being acquired has been converted to other than warehouse purposes, thus indicating that the Government did not then need and does not now need additional warehouse space; and that it should also be particularly considered whether supplies, such as metal pipes and fittings and ship-repair parts, might not as well be stored on premises already owned by the Government and whether the Government's action might not be influenced by considerations of mere convenience as regards police protection and fire control. The court then said (R. 182-183):

The truth is that the Army does have a lot of warehouse space nearby, and has had other warehouse space which has been converted to uses other than warehouse and storage uses.

The evidence is that so far as service to the civilian public is concerned, there isn't any other service which is comparable to this and that this warehouse and storage service is practically indispensable to the public.

I believe the court could more easily resolve this question were it not for the circumstance that part of the valuable warehouse and storage

space used for storage before acquisition by the Government has, after acquisition by the Government, been converted to office space. That is a strong circumstance that naturally leads to the inquiry: What use, in fact, is the Government going to make of this space after it gets it; will it use it to store this iron pipe and metal pipe fittings and consumable ships stores or will it after days or weeks convert this warehouse to other purposes such as office uses? That inquiry might just as well be made as to this property now as it could have been made as to the other warehouse property before the Government acquired it and converted it to office use. The evidence is undisputed that the former State Liquor Warehouse and the Russell Warehouse were actually converted into office uses after they were condemned by the Government during this war.

* * * * *

(R. 183-184) :

Upon a consideration of all of the evidence before the Court on this issue, I have no hesitancy in saying I do not believe that it is necessary for the war effort that the Government now acquire this warehouse as a place to store metal pipe, metal pipe fittings, metal repair parts for ships, and ships consumable stores. Everyone knows that such property is customarily stored in any kind of a building. Some of it is stored outside. Some of those metal goods are often stored outside for a limited or longer period of time; and ships consumable stores may be stored in any kind of a building that has a shelter over it such as docks and ordinarily is stored on any dock in Seattle.

So far as having these kinds of property, the metal pipe, pipe fittings and the ship repair parts, stored at a place where it can be used on a ship while it is lying at any berth,—for instance a berth at the Port of Embarkation—, there is no showing here that that is a situation any different than that attending private operation of ships.

* * * * *

(R. 185)

The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man who may have made an appraisal or an inspection or a report. Rather the Court's conclusion is more the result of the Government's past action in converting good warehouse space into office uses, and of the possibility that in view of past acts in respect to similar property the Government may change its program as to this property tomorrow.

* * * * *

(R. 186)

And the Court is of the opinion, and finds and concludes, that such action of the Government in this particular case, in the light of all of the evidence here introduced and above discussed, is capricious and is arbitrary, and therefore the Court declines to enter an order granting to the Government leave to take possession of this property as requested by the Government.

At this point in the court's oral announcement of its opinion, counsel for the Government inquired whether there was not a misconception of the United States' evidence as to the military necessities and as to the use for which the warehouse was needed and asked leave to present additional evidence on this point (R. 187). This request was denied, the court saying (R. 191-192) :

But I am going to say to you frankly what I consider to be the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case, and in favor of the Respondent's position in this case, and that is that in two instances the Government has acquired already in this neighborhood, and in one instance very near this property, at least two separate warehouse properties, and afterwards it converted them away from warehouse and storage use to office use.

* * * * *

(R. 192),

I think what is needed here is an expression by an appellate court binding upon this Court as to whether or not this Court has any discretion to search into the issue of arbitrary and capricious action on the part of the Government in a case like this.

Thereafter, in connection with the hearings in September the court made a further pronouncement of its opinion on the request for immediate possession, this being the opinion entitled in the Record as Re: Plea to Jurisdiction (R. 195-197). It adhered to the views

expressed on August 7, 1943, as to the right of the Government to an order for immediate possession and went on to say that the Government in effect was contending that (R. 196):

as to administrative acts of Government War Department officials under the Second War Powers Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.

The court thereafter added that (R. 197):

I think it is proper to comment that in the previous proceedings the Government voluntarily appeared and filed its petition for, among other relief, immediate possession of this warehouse property. The Government in that proceeding neither in writing nor orally gave the Court any information as to when or how measures for the payment, or determination of just compensation, for such taking would be taken. I believe the Constitution makes it plain that there goes with the right which the Government has to condemn private property for public use a duty to justly compensate the owner for it. Up to this time there has not been anything said or done nor has any step been taken by the Government for determining just compensation in this case.

At the September hearing the court also stated its views concerning the contempt proceedings. It first concluded that the individual government officials were

not chargeable with contempt (R. 198-203). As to the United States, the court stated (R. 202) :

* * * The United States, in the Court's opinion, has taken possession of this property without right. It has done so unlawfully, and I think that the United States should be made, in a proper proceeding, to respond in damages as for a contempt for failure to comply with the Court's order, if and when made, for the Government to return possession to those entitled to it. * * *

(R. 203-204) :

* * * The taking of possession of this property, though, the Court repeats, by the United States, after this Court denied its motion for leave to take possession, is contrary to the right of the property owner and it seems to me that if that is persisted in, will be the kind of an act which if done by a private person would justify the Court in adjudging contempt. I do not know whether the United States will continue in possession or not. If the Court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation. I do not know what it might wish to do. That is for the United States to decide, but upon a proper application, or upon proper motion therefor, this Court suggests that it will enter an order directing the United States to forthwith return this property to those who were in possession of it when the United States unlawfully took it.

Further discussion followed during which the court summarized the terms of the order it proposed to enter and stated (R. 208):

I want to say in making this order that it is without prejudice to any right the Government may have to file either in this proceeding or in a new proceeding a declaration of taking with a deposit for just compensation.

The question whether provision for payment of compensation had been made was discussed at a short hearing on October 4, 1943 (R. 211-215). Government counsel then stated that the owners could at any time request a trial as to compensation but the court disagreed (R. 214-215).

SPECIFICATIONS OF ERROR

The district court erred:

1. In entering its order of September 21, 1943, directing the United States to vacate the premises under penalty of contempt damages.

2. In holding that the taking of possession was unlawful and without right.

3. In holding that the taking of possession was arbitrary and capricious.

4. In holding that the taking of possession was not necessary.

5. In denying the Government's motion for leave to re-open the cause and present additional evidence. This motion was as follows (R. 187): "At this time the Government asks leave to re-open and recall Major Meyers to the stand to make a further showing as to the use to which this property will be put."

6. In denying the Government's motion for an order of immediate possession.

- ARGUMENT

I

The district court lacked jurisdiction to order the United States to surrender possession under penalty of damages "as for contempt"

The order of September 21, 1943, directs that the United States "forthwith, upon the entry of this order, vacate said premises" and provides that if possession is not restored "then the United States of America will be later assessed as for contempt damages" (R. 52). Clearly, the court had no jurisdiction to enter such an order.

The United States can, of course, be sued only so far as Congress has consented. With minor exceptions, it has never consented to the issuance of mandatory injunctions against it. *United States v. Mc-Lemore*, 4 How. 286 (1846); *Hill v. United States*, 9 How. 386 (1850); *Illinois Cent. R. R. Co. v. Public Utilities Comm.* 245 U. S. 493, 504 (1918). The court below did not refer to any statute authorizing such injunction in the instant case and none is known. Although this fact was called to the attention of court in the Government's "plea to jurisdiction" (R. 43), it is not referred to by the court below in its opinion overruling that plea (R. 195-197).

The fact that the order was entered in condemnation proceedings instituted by the United States does not alter the situation. "The objection to a suit against the United States is fundamental, whether it

be in the form of an original action or a set-off or a counter-claim." *Nassau Smelting Works v. United States*, 266 U. S. 101, 106 (1924); *United States v. Shaw*, 309 U. S. 495 (1940); *United States v. United States Fidelity Co.* 309 U. S. 506 (1940). As the court said in the *Fidelity Co.* case (p. 514): "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void."

No such consent may be implied from the condemnation statutes. In *Moody v. Wickard*, 136 F. 2d 801 (App. D. C. 1943) certiorari denied 320 U. S. — (October 25, 1943) condemnation proceedings, which did not invoke the Declaration of Taking Act, were brought to acquire property of which the United States had already taken possession. The court entered a personal money judgment against the United States. The Court of Appeals for the District of Columbia held that the taking of possession did not justify such a judgment, which was therefore void for lack of congressional consent. Thus, unless the Government invokes the Declaration of Taking Act, the condemnation court lacks jurisdiction to enter a money judgment against the United States. *Cf. New York Telephone Co. v. United States*, 136 F. 2d 87 (C. C. A. 2, 1943. The remedies which might be available under the Tucker Act are irrelevant here, for Tucker Act claims cannot be joined with condemnation proceedings. *New York Telephone case, supra; United States v. Sherwood*, 312 U. S. 584 (1941). It obviously follows that the court below lacked authority to enter the mandatory injunction directing the re-

turn of the property or, alternatively, the payment of money damages.

II

The United States is authorized to take possession of property without court order

The court below took the view that the United States "has taken possession of the property in issue unlawfully and without right" (R. 51). In the interest of orderly procedure the Government has pursued the policy of applying to the court for an order of immediate possession as was done in the instant case. *Cf. City of Oakland v. United States*, 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942). However, it is clear that such order is not necessary and the Government is empowered to take possession without court action.

A. *The Second War Powers Act specifically authorizes the taking of possession without court orders.*—Title II of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, provides that "Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law." The language of the Act is plain. The previous sentence of the Act authorizes "The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation" to acquire property "that shall be deemed necessary for military, naval, or other war purposes" and dispose of it. Obviously it is those officers, not the court, which will occupy, use and improve the prop-

erty. The expression "immediate possession may be taken" is a parallel structure to "the property may be occupied, used and improved." In both instances, the action is taken by the government officer. The Act provides that upon or after the filing of the petition, possession may be taken. Thus, the only limitation upon taking possession is that a condemnation petition be filed. There is no requirement that a hearing be held or a court order be obtained nor is there any language to justify the imposition of such limitations upon the power to take immediate possession. Thus, the statute is unambiguous and specifically authorized the taking of possession in the instant case. The request of the Acting Secretary of War that proceedings be instituted and the petition of condemnation both referred to the Second War Powers Act (R. 167, 4). Nevertheless, the court below made only passing mention of the Act and did not indicate any reason why it does not apply here.

Any doubt as to the meaning of the Second War Powers Act disappears when the circumstances under which it was enacted and its legislative history are considered. The first general federal legislation concerning eminent domain was the General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 258, which provided for conformity to local practice. Under this provision the taking of possession and commencement of construction was often long delayed because many states permitted such taking only after compensation had been paid. This delay became important during the first World War resulting in the Act of July 2, 1917, c. 35, 40 Stat. 241, 50

U. S. C. sec. 171, authorizing the taking of immediate possession in condemnation proceedings brought by the Secretary of War to condemn lands for specified war purposes. During the first World War the procedure of an administrative taking without court proceedings was frequently employed, the owner being relegated to a suit under the Tucker Act to recover compensation. See e. g. *Campbell v. United States*, 266 U. S. 368, (1924); *United States v. North American Co.* 253 U. S. 330 (1920). This was essentially the procedure under the Lever Act which provided for an administrative taking and estimate of compensation. If the owner was dissatisfied with the estimate he could withdraw three-quarters thereof and bring suit for the balance. See e. g. *Luckenback S. S. Co. v. United States*, 272 U. S. 533 (1926); *Seaboard Air Line Ry. v. United States*, 261 U. S. 299 (1923).

In the years following the first World War the need for an orderly procedure for the immediate taking of possession became evident. In some cases a court order for such possession was obtained, but not without dispute. See e. g. *Commercial Station Post Office v. United States*, 48 F. 2d 183 (C. C. A. 8, 1931). And, in other instances, statutory provision was made for the procedure to be followed in taking immediate possession. See e. g. River and Harbors Act of July 18, 1918, c. 155, 40 Stat. 911, 33 U. S. C. sec. 594; Mississippi River-Flood Control Act of May 15, 1928, c. 569, 45 Stat. 536, 33 U. S. C. sec. 702d. In order to expedite the construction of public works the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a-f, was passed.

That Act permits the United States to file a declaration of taking in pending condemnation proceedings. Upon the filing of the declaration and the deposit of estimated compensation title passes without court order. *City of Oakland v. United States*, 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942). The Act further provides that "upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."

This procedure is adequate to fulfill the Government's needs during peacetime. And it has been followed whenever possible during the present war. However, even this procedure causes delay which, in particular instances, seriously impedes the prosecution of the war. The constant technological advances and changes on the world-wide battlefronts produce changes in the requirements of the Army, Navy, and other war agencies almost overnight. Before a declaration of taking can be filed, appraisals must be made as a basis of the estimate of compensation. A description of the property must be prepared and carefully verified, because the Government is compelled to pay for property included in the declaration by mistake. *United States v. Sunset Cemetery Co.*, 132 F. 2d 163 (C. C. A. 7, 1942). Delay also occurs between the time the declaration is filed and the possession is awarded.

The Second War Powers Act was passed to avoid this delay. As its title recites, it was enacted "To further expedite the prosecution of the war," 56 Stat. 176. During the hearings on the bill Department of

Justice officials stated: "The purpose of this, Senator, was to avoid the complexity of the present procedure, so that immediate possession of the property, where it was essential for war purposes, could be had, and I think some of the advantage would be lost if you make any administrative procedure necessary there." Statements in Executive Session, S. Committee on Judiciary, S. 2208, 77th Cong., 2d sess. (1942), p. 15; see also p. 7. In reporting the bill, the committee stated that "the principal utility of this title [Title II] is that the Government may obtain immediate possession of property and dispose of such property for war purposes," S. Rept. No. 989, 77th Cong., 2d sess. (1942) p. 4. During the debate Senator O'Mahoney, sponsor of the bill, said with reference to the purpose of the Act (88 Cong. Rec., pt. 1 (1942), p. 623; see also *Id.* p. 639):

It is our feeling that we are in a very desperate war, and that it is highly desirable to waive anything that might impede the effort, and that there should be no handicap upon the President, and those who are carrying on the war in doing what may be necessary at the time.

It is, therefore, clear that language of the Second War Powers Act was advisedly used so as to grant specific legislative approval to the taking of possession without court order and without making a deposit. The intention of avoiding the delays incident to use of the declaration of taking procedure was expressed by the provision that possession might be taken "upon * * * filing of the petition," thus avoiding delays caused by service of process, hearings, etc., and was

emphasized by the phrase “notwithstanding any other law.” The court below has nullified the plain language and intent of this statute and seeks to make the declaration of taking procedure compulsory. Thus, in overruling the Government’s “plea to jurisdiction” the court said that the Government had not taken any steps for determining just compensation (R. 197). And in its opinion “Re Contempt Proceedings” it said (R. 204; see also R. 208, 212):

If the court orders the United States to return possession forthwith, it might be that the United States would prefer to do that and then institute the normal kind of condemnation proceedings by declaration of taking and depositing in court of just compensation.

Thus, the conclusion of the court below, that the taking of possession was unlawful was based on the court’s view that the United States cannot take possession without making a deposit. Such is the provision of several state constitutions. But, as the Supreme Court has many times held, no such limitation applies under the federal constitution.¹ Thus, the Declaration of Taking Act goes much further than the Fifth Amendment requires. It is not a general limitation upon all condemnation proceedings nor may it be invoked by the condemnee. As the Act provides “the petitioner may file * * * a declaration of taking.” It is simply an ancillary procedure which

¹ *Bauman v. Ross*, 167 U. S. 548 (1897); *Williams v. Parker*, 188 U. S. 491 (1903); *Crozier v. Krupp*, 224 U. S. 290 (1912); *Bragg v. Weaver*, 251 U. S. 57 (1919); *Joslin Co. v. Providence*, 262 U. S. 668 (1923); see *Garrow v. United States*, 131 F. 2d 724 (C. C. A. 5, 1942), certiorari denied 318 U. S. 765 (1943).

may be invoked by the Government if it so desires. The fact that the Government has utilized the Act whenever practicable so as to make funds available for payment to the condemnee and a saving of interest to the Government (cf. *United States v. Miller*, 317 U. S. 369, 381 (1943)) does not mean it can be compelled to do so. When payment is not made prior to the taking of title or possession, the condemnee is compensated by payment of interest. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299 (1923).

Under the district court's view, the Second War Powers Act would mean no more than the Declaration of Taking Act. The plain language of the Act, especially the words "notwithstanding any other law" may not be thus deleted from the statute and the purpose for which it was inserted nullified. The contrary construction is especially unwarranted in view of the fact that war statutes must be liberally construed in order to achieve their legislative purpose that the war may be waged successfully.²

B. *Even apart from the Second War Powers Act, the United States, by its authorized officers, may take possession of land without court order.*—The United States is not obligated to make payment in advance of taking property, *supra* p. 24. Consequently, property may be taken without resort to condemnation proceedings. *United States v. Lynah*, 188 U. S. 445, 465 (1903); *United States v. Cress*, 243 U. S.

² *Ex Parte Quirin*, 317 U. S. 1, 25 (1942); *Hirabayashi v. United States*, 320 U. S. 8 (1943); *Highland v. Russell Cas. Co.*, 279 U. S. 253, 262 (1929).

316, 329 (1917); *Campbell v. United States*, 266 U. S. 368, 370-371 (1924). The owner cannot enjoin the action of the government agents in taking property because he has an adequate remedy at law to recover compensation under the Tucker Act. *Hurley v. Kincaid*, 285 U. S. 95 (1932); *Yearsley v. Ross Constr. Co.*, 309 U. S. 18 (1940). Cf. *Commercial Station Post Office v. United States*, 48 F. 2d 183 (C. C. A. 8, 1931). This rule has reference, of course, to situations in which the governmental agent is properly acting in his official capacity. The court below held the officers were so acting in the instant case (R. 199-202). If the officer exceeds his authority as a government agent he may be proceeded against personally in ejectment or for damages. *United States v. Lee*, 106 U. S. 196 (1882); *Philadelphia Co. v. Stimson*, 223 U. S. 605 (1912); *United States v. North American Co.*, 253 U. S. 330 (1920); *New York Telephone Co. v. United States*, 136 F. 2d 87 (C. C. A. 2, 1943).

Thus, the United States has authority to take property without resort to judicial proceedings and the landowner is relegated to a suit under the Tucker Act. This power has been exercised on many occasions. It was adopted as a policy to be followed during the last war in the Lever Act, see *supra*. The Declaration of Taking Act and the Second War Powers Act provided for procedures whereby compensation will be determined in the court where the land is situated, whereas the Tucker Act requires that claims for more than \$10,000 be litigated in the Court

of Claims (28 U. S. C. sec. 41 (20)).³ Thus, both Acts, rather than enlarging the powers of the Government, provide permissive procedures which operate to the landowner's benefit. They do not limit the governmental power, which has always existed, to authorize the taking of property without resort to judicial proceedings. The holding of the court below that the United States "has taken possession of the property in issue unlawfully and without right" (R. 51) was, therefore, plainly erroneous.

III

The taking of possession was not arbitrary or caparicious

In requesting institution of the condemnation proceedings, the Acting Secretary of War stated (R. 168):

The aforementioned lands are to be used for the storage of military supplies and for other military purposes and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of [the Second War Powers Act] you procure from the court an order granting to the United States immediate possession of the aforesaid lands.

³ The Government called attention to the prayer of the petition in the instant case that "compensation [to] be paid for the appropriation of said estate in said property and that the parties entitled thereto be ascertained and determined" (R. 7). The court below apparently believed that, despite this prayer, the landowners would be powerless to expedite the determination of compensation (R. 214). There is nothing to prevent the court from setting the case for an early trial as to compensation.

Pursuant to this request, the petition prayed that the court grant immediate possession (R. 7). After hearing evidence, the district court declined to grant such order on the ground that the government officers "have acted capriciously and arbitrarily and that the taking immediate possession of the property in the petition described is not necessary" (R. 20). The court purported to recognize the limitations upon the review of the determination of the administrative authority. But, in fact, it simply substituted its own judgment, based upon incomplete information, for that of the Acting Secretary of War.

A. *The necessity of the taking is not subject to judicial review.*—The General Condemnation Act of August 1, 1888, 40 U. S. C. sec. 257, authorizes a government officer to condemn property "whenever in his opinion it is necessary or advantageous to do so." Similarly, the Second War Powers Act authorizes the condemnation of property "that shall be deemed necessary for military, naval, or other war purposes," 50 U. S. C. A. App. sec. 632. These statutes vest in the administrative officer the discretion to determine the necessity of condemnation. *Old Dominion Land Co. v. United States*, 269 U. S. 55 (1925); *City of Oakland v. United States*, 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942); *United States v. 243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2, 1942) certiorari denied *sub nom. Lambert v. United States*, 317 U. S. 698 (1943); *United States v. Montana*, 134 F. 2d 194 (C. C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943); *United States v. Meyer*, 113 F. 2d

387, 392 (C. C. A. 7, 1940), certiorari denied 311 U. S. 706 (1940). As the court said in the *243.22 Acres* case: "The decision of the Secretary of War is not open to judicial inquiry." And this Court in the *Oakland* case stated: "Where the Secretary of War has proceeded as prescribed by the Act of Congress, the court will not go behind his declaration to inquire into his intentions." Except for the decision in the instant case, no federal court has ever rejected an administrative determination of necessity.

The court below relied entirely on *Carmack v. United States*, 135 F. 2d 196 (C. C. A. 8, 1943), which simply held that under the circumstances the appellant should have an opportunity to prove that the Government official had acted "arbitrarily or capriciously." The decision also rested on the ground that the Postmaster General had not concurred in the selection of the post-office site as required by the statute there involved. This decision is not in conflict with those above cited nor does it tend to support the action of the court below in the instant case.

The phrase "arbitrary or capricious" does not mean that the court may investigate the correctness of the administrative judgment. The court below specifically declined to ascribe any bad faith or personal motive in the instant case. It said (R. 178) that the Government is required to proceed in "constructive good faith as well as good faith in fact." And it stated (R. 184-185):

the Court does not say or imply that any particular officer of the Government or any par-

ticular military man has gone out with a deliberate attempt to act facetiously with respect to the public generally. * * *

The Court's conclusions relate to the situation as a matter of law, not as a matter of any express design going to the question of proper lawful or other kind of motives of the particular official or military man * * *.

Thus, the court put aside any notion that the Acting Secretary of War was motivated by personal considerations and, of course, there is not one word of evidence to support any such conclusion. The fact is, therefore, that acting in his official capacity, the Acting Secretary of War determined that the best interests of the Government required the taking of immediate possession of the property here. The contrary conclusion of the court below necessarily means simply that the court disagrees with this judgment. Reference to "constructive good faith" and characterizations of the government action as "arbitrary" or "capricious" cannot change the fact that the court has attempted to review the wisdom of the officer's judgment. That this is what the court did is evident from the factors which influenced its conclusion. Both its findings (R. 12-20) and its opinion (R. 177-186) make it perfectly plain that the court balanced what it considered the military necessities to be against similar civilian necessities. All of the evidence related, not to the factors on which the government official based his judgment, but to the relative requirements of the Army and civilians (see *supra*, pp. 5-9). In its conclusion of law II, after characteriz-

ing the governmental actions as "arbitrary and capricious" the court stated its ultimate conclusion "that the taking immediate possession of the property in the petition described *is not necessary*" (R. 20).

This is precisely the question which is not subject to judicial review, see *supra*, p. 28. It is not the function of the court to receive evidence from the Government that it needs the property and from the condemnee that he also needs it and that the Government can get along without it and to determine from such evidence whether the Government should be permitted to take it. As the Court said in *Rindge Co. v. Los Angeles*, 262 U. S. 700, 709 (1923): "The necessity for appropriating private property for public use is not a judicial question." Again "the federal statute (40 U. S. C. A. sec. 257) does not require proof of 'necessity' but makes that question depend solely on the 'opinion' of the federal officer. It is controlling here." *United States v. Montana*, 134 F. 2d 194 (C. C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943). The conclusiveness of the administrative finding of necessity is particularly important during wartime. "The decision of the Secretary of War is not open to judicial inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies." *United States v. 243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2, 1942).

The instant case aptly illustrates the reason for the rule. The decision of the Acting Secretary of War that "the utmost haste in expediting this project is vital to the successful prosecution of the War" was

made July 29, 1943 (R. 155, 168). The hearings were had before the court on August 4, 5, and 7, 1943. And, on August 7, 1943, the court concluded "I do not believe that it is necessary for the war effort that the Government now acquire this warehouse" (R. 183). The property is needed in connection with operation of the Seattle Port of Embarkation. The obvious function of that port is the dispatch of troops and supplies to the Pacific war theater. Subsequent events indicate the considerations which may fairly be assumed to have influenced the Acting Secretary of War. American forces landed on Kiska August 15, 1943. The battle of Tarawa and occupation of the Gilbert Islands occurred in November. And military operations have been greatly accelerated recently in all the Pacific theater, including the bombing of Paramashiru. Plans for these operations could not, of course, be revealed or even hinted at during the hearing in open court. The furthest the government witnesses could go was to state that increased activity at the port could reasonably be expected and that exclusion from the property would materially impair that war effort (R. 128-129). Thus, a balancing by the court of military necessities against civilian convenience is not only unauthorized but impractical in fact because the military needs can be revealed in public hearings only in the most general terms. As the court has recently stated in *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943):

Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the

Government on which the Constitution has placed the responsibility for war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

And as Justice Douglas remarked in his concurring opinion in the *Hirabayshi* case (320 U. S. at p. 106): "We cannot possibly know all the facts which lay behind that decision [of the military]." The very purpose of the Second War Powers Act was to permit the Government to take immediate possession without the necessity of any hearing such as occurred in the instant case. During the debate on the bill, Senator O'Mahoney stated (88 Cong. Rec., p. 623, see *supra* p. 23) "there should be no handicap on the President, and upon those who are carrying on the war in doing what appeared necessary at the time."

B. *In any event, the facts do not support the district court's conclusion that the taking was arbitrary and capricious.*⁴—The property in question was at the time completely surrounded by Government buildings (R. 75, 130). Some of those structures had originally been used for warehouse purposes but after acquisition by the Army had been remodeled for other uses, in-

⁴The usual presumption that the action of government officers is valid, applies to the determination of the Acting Secretary of War; hence the burden was upon appellees to prove that such determination was arbitrary and capricious. *United States v. Chemical Foundation*, 272 U. S. 1 (1926); cf. *United States v. Parcels of Land in Denton*, 30 F. Supp. 372, 379 (Md. 1939); *United States v. 23,263 Acres of Land in Pierce County*, 45 F. Supp. 163 (W. D. Wash. 1942). In the court below, appellee's counsel asserted that the burden of proof was upon the Government and the court apparently acquiesced in that view (R. 184, 189).

cluding office space (R. 129, 147-149, 152-153). The property was needed for warehouse space, the first floor to be used for ships stores, and the remainder of the building for supplies, material and equipment for a marine repair shop (R. 132, 134). The taking of the building would also facilitate protection of the port against sabotage and fire hazards (R. 130-132).

The condemnee's evidence largely related to the needs of Merchants Transfer & Storage Co., lessee who was occupying the building. It was engaged in the transfer and storage of many products including food-stuffs. Its customers and other warehousemen testified that no warehouse to which it could move was available in Seattle and that continuation of its business was very important in supplying food in the area.

The court's conclusion was largely based on the fact that other warehouses had been converted to office use. The court referred to this fact as "the most weighty evidence in the case, which overbalances the weight of the evidence on the Petitioner's side of the case" (R. 191-192). During the hearing the court expressed the notion that the office work could be done in tents (R. 150-152). But the government evidence was uncontradicted that certain office work was "as essential as cargo" to operation of the Army port (R. 150) and such space was not otherwise available (R. 149). Plainly, the court was not warranted in completely disregarding this evidence, and the findings based upon this notion that the port did not need office space (R. 18-19) are contrary to the evidence.

The other fact upon which the conclusion was based was the finding that the property "could be just as well

cared for out in the open air" (R. 18). This finding likewise disregards uncontradicted evidence. It was based on the statement that the repair parts included metal pipe, metal pipe fittings, and other metal repair parts (R. 18). But the testimony was that thousands of types of supplies ranging from gaskets to steel plate were included (R. 137). This embraced "electrical supplies and various types of communications supplies" (R. 137). Obviously, such articles could not be "just as well cared for in the open air." The witness said (R. 138), "Generally, the supplies stored under coverage are those which would be damaged by the weather or deteriorated rapidly under weather conditions." Moreover, the witness stated that there was no available space in the port (R. 141). This is not a question of conflicting evidence, because the condemnees did not present any evidence concerning the availability of space at the port or the practicability of using unprotected land rather than the warehouse. All the testimony on the subject was given by government officers, principally Major Meyers (R. 121-175). Plainly the court was not justified in disregarding his uncontradicted testimony. Moreover, when the Government realized the position the court was taking it moved to reopen the case to present additional evidence stating (R. 191) "we can furnish plenty of additional evidence as to the details of this storage and to show that a lot of it is incapable of being left out in the weather." However, the court denied this motion (R. 192). In view of the importance of the matter and in view of the fact that presenting such evidence

would have caused very little delay, it was plainly an abuse of discretion to deny this motion.

Finally, the Court did not deny the right of the Government to condemn nor did it dismiss the petition. It merely denied the application for an order of immediate possession. This was done August 13, 1943 (R. 22). The Government took possession almost a month later on September 8, 1943 (R. 25). In doing so, Merchants Transfer & Storage Co. was not immediately evicted from the premises. The Government permitted it to continue its usual course of business in distributing the merchandise stored in the building and simply prevented Merchants from putting more goods in storage (R. 36, 207). The hearing concerning the contempt proceedings was held September 20, 1943 (R. 198), more than a month and a half after the original hearing. The Government called attention to the fact that there was a difference in circumstances and stated it was prepared "to show in proof why this property is necessary insofar as the facts can be revealed without affecting the public security adversely" (R. 204; see R. 206). Nevertheless, the court based its ruling upon facts shown at the original hearing (R. 205). Here again the failure to receive additional evidence was plainly erroneous.

The injunction order recites the taking of possession was "contrary to this Court's order of August 13, 1943" (R. 51). But the earlier order merely denied the Government's motion for an order of immediate possession (R. 22). It did not purport to restrain the Government from taking possession later. In fact, it recognized that further proceedings of some nature

would be had, for it declined to pass upon the condemnée's motion to dismiss (R. 22). The question presented at the later hearing—whether the Government's administrative taking of possession was illegal—was entirely different from the issue at the first hearing, which was only whether the court in the exercise of its discretion should order immediate delivery of possession. And the circumstances at the time possession was taken were different than they were at the first hearing. The court held that the government officers had not violated the order of August 13 because that order "did not command them either to do or not do anything" (R. 199). This reason applies with equal force to the United States. There was, therefore, no warrant for holding that the taking of possession was contrary to the first order.

CONCLUSION

It is submitted, therefore, that the order of the district court should be reversed, the injunction revoked, and the cause remanded with directions to determine compensation for the term taken.

Respectfully,

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MARCH 1944.

APPENDIX

The General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec. 257, provides:

In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

* * * * *

The Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a, so far as pertinent, provides:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judg-

ment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

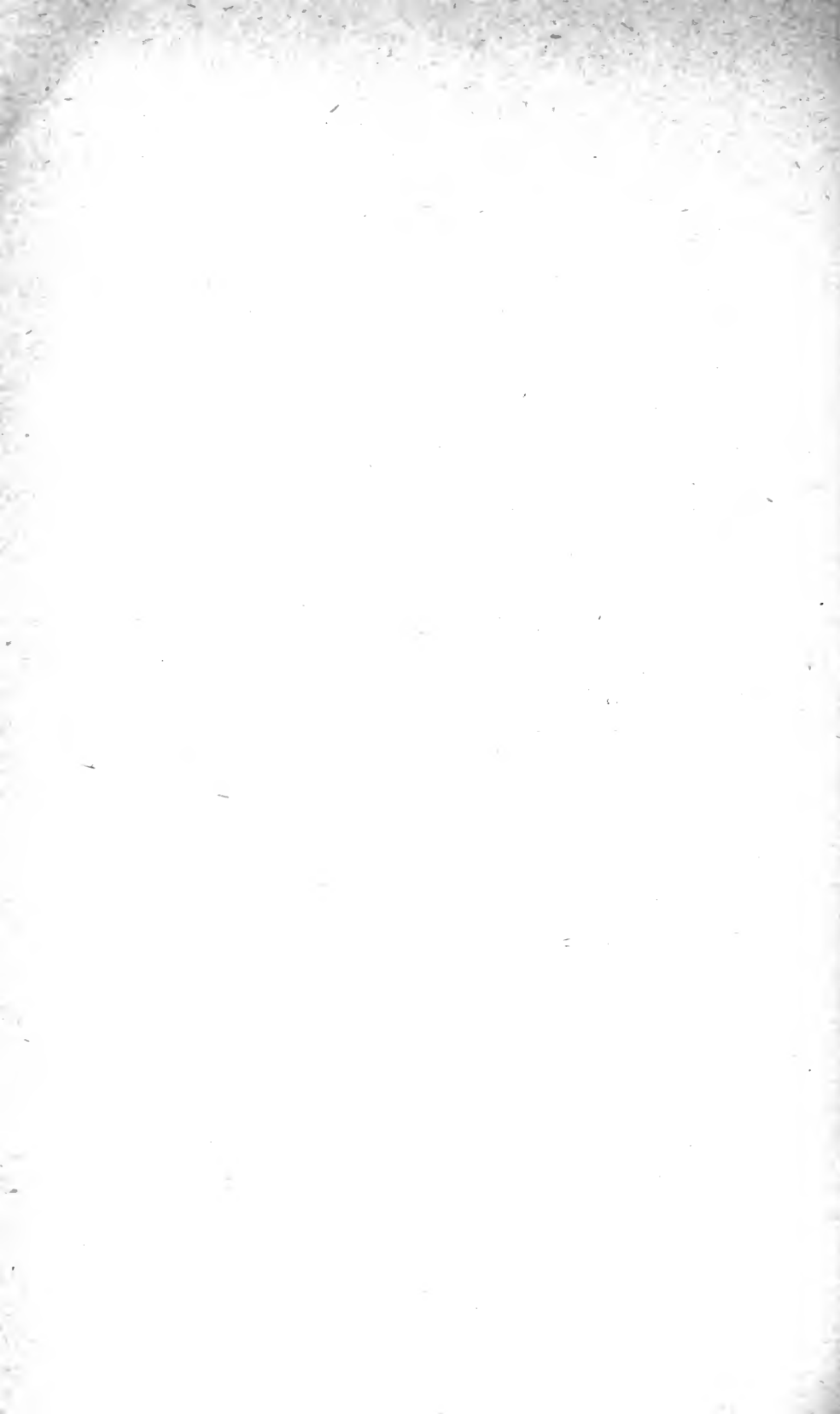
* * * *

Title II of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 50 U. S. C. A. App. sec. 632, provides:

The Act of July 2, 1917 (40 Stat. 241) [Title 50, § 171], entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed

necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357) [Title 40 §§ 257, 258], or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712) section [1171 (b) of this Appendix]. Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act [this section and section 171 of Title 50], notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended [Title 33, § 733; Title 34, § 520; Title 40, § 255; Title 50, § 175].”



**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA, *Appellant,*
vs.

MERCHANTS TRANSFER & STORAGE Co., a corporation,
SKINNER & EDDY CORPORATION, a corporation,
LEWIS L. STEDMAN, Liquidating Trustee of Skinner
and Eddy Shipbuilding Company, a dissolved cor-
poration, and KING COUNTY, WASHINGTON, a mu-
nicipal corporation, *Appellees.*

and

MERCHANTS TRANSFER & STORAGE COMPANY, a cor-
poration, SKINNER & EDDY CORPORATION, a corpor-
ation, and LEWIS L. STEDMAN, Liquidating Trustee
of Skinner and Eddy Shipbuilding Company, a dis-
solved corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA and KING COUNTY, WASH-
INGTON, a municipal corporation, *Appellees.*

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Company, a dissolved corporation.

STATEMENT

The Government appeals from an order requiring
the United States forthwith to return to the con-
demnee possession of property wrongfully taken and

if not forthwith restored to Appellee, contempt damages will be later assessed, claiming:

(a) That the court had no power to enter such order; and

(b) That the original order denying "immediate" possession after hearing in condemnation proceedings, was invalid.

Appellee, Skinner and Eddy Corporation, is the owner of the fee and Appellee, Merchants Transfer & Storage Co., is the lessee.

Generally, hereafter, where we refer to Appellee, unless otherwise stated, is meant the Lessee (*Italics ours*).

Lessee is a public warehouse, licensed under the laws of the State of Washington—Uniform Warehouse Receipts Act. Ten per cent of its warehouse space was held for use by the Government and it was classed by the Government as an essential war industry (R. 95).

Appellee is, then, a public utility.

Davis Warehouse Co. v. Bowles, Vol. 88, L. ed. Advance Opinions No. 7, page 379.

The above case, decided January 31, 1944, holds that such a warehouse is a public utility, within the meaning of the Price Control Act and that such warehouse is not subject to Federal control.

In 1941 the Government, in proper proceedings, condemned the warehouse property then occupied by Appellee. No other warehouse space was available but Appellee obtained a five year lease (Exhibit A-1) upon the building now in question at a rental of \$850.00 per month and spent \$12,500.00 in structural

improvements so that it could carry the necessary loads (R. 96).

On July 29, 1943 the *Acting* Secretary of War, Robert P. Patterson, directed the Attorney General:

“* * * It is requested that you cause the necessary proceedings to be instituted for the *condemnation* of a term of years ending June 30, 1944, extendable for yearly periods thereafter during the existing national emergency * * *

“It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942 (Public Law 507-77 Congress) *supra*, you procure from the court an order granting to the United States immediate possession of the aforesaid lands.” (R. 167, Ex. 3)

On June 30, 1943, the Attorney General directed his Special Assistant in Seattle:

“* * * Will you please prepare and file a *petition in condemnation and secure the entry of an order confirming possession* pursuant to the Act of Congress of March 27, 1942. * * * Please advise the Department by wire the day and hour the petition is filed and the day fixed in the order of the court for the surrender of the property * * *.” (R. 171, Ex. 4)

On August 2, 1943, the Government filed its “*Petition in Condemnation*,” pleading that:

“The *Acting* Secretary of War has requested the Attorney General to *secure an order of the court directing the surrender of the possession of said property described above forthwith and granting to the United States the immediate right to occupy, use and improve said premises.*”

The prayer conforms with the petition (R. 3-7).

After a full and complete hearing, the District Court, pursuant complete Findings of Fact and Conclusions of Law (R. 12) on August 13, 1943, entered the order denying the necessity of and the right to immediate possession (R. 21).

Notwithstanding the action pending and the solemn judgment of the court after hearing had, the Government, on the 8th day of September, 1943, acting through Sherman B. Green, "Chief Seattle Sub-Office" of the War Department, Office of Division Engineer, and accompanied by the armed forces of the United States under command of Major S. N. Tideman, Jr., seized the physical possession of said property and ousted the owners from possession thereof (R. 25).

Petition for Rule and Attachment in re: Contempt was duly filed in the cause and Order to Show Cause why they should not be punished for contempt for not abiding the order of the court theretofore entered was issued, directed to the Hon. Henry L. Stimson, Secretary of War, the Hon. Robert P. Patterson, *Under* Secretary of War, Herman B. Green and Major S. N. Tideman, Jr. (R. 23-39).

Upon the hearing in response to said citation, the District Court entered the order from which the appeal is prosecuted:

"This court finding that the plaintiff, United States of America, has taken possession of the property in issue unlawfully and without right *and contrary* to this court's order of August 13, 1943, denying it immediate possession,

"IT IS ORDERED, ADJUDGED and DECREED that the United States of America forthwith return said

property * * * to the possession of (Appellees)
* * * ; and

“The United States of America, through its attorneys of record, having stated in open court that possession will not surrendered and the mandate of this court obeyed,

“IT IS ORDERED that if upon the entry of this order possession is not forthwith restored to said parties named then the United States of America will be later assessed as for contempt damages, the amount thereof to be ascertained by further hearings herein * * *.” (R. 49)

The individuals cited were adjudged not in contempt (R. 49-52).

ARGUMENT

Appellant asserts that under the Second War Powers Act (These Acts see Appendix, Appellant's brief 38-41) it could take immediate possession without any order of court.

That general proposition is not before this court upon the Government's appeal.

The Government did not, in the first instance, rely upon that asserted power which would raise a grave constitutional question but, proceeding as specifically directed by the *Acting* Secretary of War, invoked the jurisdiction of the District Court not only in filing its Petition in Condemnation but in seeking an order of the court for immediate possession.

Having admittedly invoked the jurisdiction of the District Court, it then became bound by the order and judgment of that court.

“Jurisdiction” is the power to hear and determine.

Davis v. Cleveland, etc., 217 U.S. 147, 54 L. ed. 708;

2 Words and Phrases, 1277.

“When the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.”

Luckenbach S. S. Co. v. Norwegian Barque “Thekla,” 266 U.S. 327, 69 L. ed. 313.

The Government argues (Brief 17) that the Government can be used only so far as Congress has consented. With that we do not disagree except as stated in the *Luckenbach* case, *supra*, when the Government invokes the jurisdiction of the court it is then bound by the result.

The Siren, 7 Wall. 152, 19 L. ed. 129;

The Davis, 10 Wall. 15, 19 L. ed. 875;

Carr v. U. S., 98 U.S. 433, 25 L. ed. 209.

In the *Carr* case, *supra*, we find:

“The cases like that of *The Siren* and *The Davis* * * * in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the Government itself seeks its right at the hands of the court, equity requires that the rights of other parties interested in the subject matter should be protected * * *.”

Again, referring to *The Siren*, Mr. Justice Bradley, in the *Carr* case, states:

"It was held that, inasmuch as the United States *had resorted to the aid of the court to procure the condemnation* of The Siren, and had thus placed her *proceeds in the course of judicial administration*, any proper claim against the vessel itself, prior to that of the Government, might well be satisfied out of such proceeds. At the same time it was conceded that neither the Government nor its property can be subjected to direct legal proceedings without its consent, * * *."

Whether the Government might have proceeded under the Second War Powers Act without seeking an order for immediate possession is beside the point. The Government invoked the jurisdiction of the court, specifically sought an order for immediate possession, and same, after full hearing, was denied. Having invoked that jurisdiction and the jurisdiction in the cause continuing, the Government was bound by the order entered.

The Second War Powers Act provides that the Secretary of War

- (a) "May acquire, by purchase, donation or other means of transfer," or
- (b) "*May cause proceedings to be instituted in any court having jurisdiction of such proceedings to acquire by condemnation* * * *"
- (c) "Such proceedings to be in accordance with the Act of August 1, 1888 * * * or any other applicable Federal statute * * *."
- (d) "Upon or after the filing of the condemnation petition immediate possession may be taken and the property may be occupied, used and improved for the purposes of this act * * * notwithstanding any other law."

The Government argues that the latter clause should be taken out of its context and read alone. It further argues that the Government always has the right to take the immediate possession of any property, irrespective of statute or of the Fifth Amendment.

We submit that the Government confuses “power” of the Sovereign with “right” of the Sovereign.

Unquestionably, the Government has power, and it exercised that power against the citizen in this instance, using the armed forces of the United States.

A careful reading of the cases will not disclose the right but only the power; but for the Fifth Amendment, the Sovereign would have both power and right. Because of the Fifth Amendment, when it has exercised the power without the right the cases give a right of action to the citizen.

The Second War Powers Act did not extend the rule. Under that Act the condemnation proceedings must be instituted in a court having jurisdiction and under the applicable statutes. One of the applicable statutes is the Declaration of Taking Act of February 26, 1931, which provides that:

“Said declaration of taking shall contain or have annexed thereto * * * (5) a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

“Upon the filing of said declaration of taking *and of the deposit in the court, to the use of the persons entitled thereto* of the amount of the estimated compensation stated in said declaration” title to said lands shall pass.

“Upon the filing of a declaration of taking, *the court shall have power to fix the time within*

which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."

The original General Condemnation Act of August 1, 1888, specifically provides that the condemnation proceedings shall be "under judicial process."

In the instant case no estimate of just compensation was filed and no money was paid into the registry of the court in this proceeding and, notwithstanding the physical possession by the Government, the tenant is still paying \$850.00 a month under its lease and must continue so to pay for the full five year period.

The Government did not pretend to proceed under any right of immediate taking but sought an order from the court in that particular. Upon the hearing the immediate right was denied.

This case in no wise involves either the power or the right of the Government to condemn this property (upon the Government's appeal). It does involve the claimed right of immediate possession where that right was denied by the District Court having jurisdiction and which jurisdiction was invoked by the Government.

The purpose of the Acts may have some bearing as to both the power and right of the Government upon the one hand and the right of the citizen upon the other.

We will refer particularly to cases relied upon by the Government in its brief.

(a) *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 296, 67 L. ed. 664.

There, the Government exercised the *power*,—not

the right,—to seize. It did not invoke the jurisdiction of the court. The land owner was compelled to sue.

Said the court:

“Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.”

The distinction, where the Government invokes the jurisdiction of the court in a condemnation proceeding and its liability and the right of the land owner, as distinguished from the power of taking without the right is forcibly stated in

(b) *U. S. v. North American Co.*, 253 U.S. 330, 64 L. ed. 935.

Says Mr. Justice Brandeis, with reference to a condemnation proceeding:

“Such a proceeding is not a suit by the land owner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the Government institutes in order to secure title to land * * *. On the other hand this suit, brought in the court of claims, is a very different proceeding.”

In the one suit where the Government, using its power, seizes the land owner is relegated to an indispudant action in the Federal courts. In the other, where it proceeds under the orderly processes of the court, it has invoked the jurisdiction of the court and the rights of the land owner are determined in that proceeding. Such is the case at bar.

The Government places great reliance upon

(c) *City of Oakland v. U. S.*, 124 F.(2d) 959.

It is to be noted that in the *Oakland* case the money

was deposited in the registry of the court pursuant to the statute *and the court fixed the time for taking.*

The Circuit Court approved the ruling of the District Court, saying that if, on future hearings, "it is ultimately determined that the declaration of taking is effected with fraud or bad faith, it would follow that the declaration of taking will be a nullity."

The opinion points out that under the statute it was the duty of the court, and the court was required to fix the time and terms upon which defendant should surrender possession.

In the case at bar the Government invoked the jurisdiction of the court to the end that the court should fix the time and terms upon which Appellee should surrender possession. True, it sought immediate possession but it did invoke the jurisdiction, and a careful reading of the *Oakland* case discloses that the court accepted jurisdiction and did fix the time and terms for surrendering possession.

(d) *Campbell v. U. S.*, 266 U.S. 368, 69 L. ed. 328,

is again a case where the Government exercised its power as distinguished from the right and the land owner was relegated to an independent suit.

(e) *Commercial Station P. O. v. U. S.*, 48 F. (2d) 183:

That case is pertinent here, for, says the opinion:

"As to the necessity of the order, the court was not ruled by the necessity but by the advisability of the order. *Such determination is within the discretion of the trial court and should not be overruled, unless clearly exercised improperly.*"

(f) *Bauman v. Ross*, 167 U.S. 548, 42 L. ed. 270.

That condemnation was under a special act of Congress but the duty of protecting the land owner is well stated in the opinion:

“Under the Constitution, and by the express provision of Section 18 of this Act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous.”

To the same effect is

(g) *Williams v. Parker*, 188 U.S. 491, 47 L. ed. 559.

Says Mr. Justice Brewer:

“There can be no doubt that if *adequate provision for compensation is made* authority may be granted for taking possession pending inquiry as to amount which must be paid and before any final determination thereof.”

(h) *Joslin v. Providence*, 262 U.S. 668, 67 L. ed. 1167.

Says the opinion:

“It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.”

The purpose of the Declaration of Taking Act is stated in *U. S. v. Miller*, 317 U.S. 369, 87 L. ed. 336.

The Government refers to a portion of a paragraph (Brief 25). We complete the paragraph:

“The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. *Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government’s estimate of the value of the property.*”

The Government relies on *U. S. v. Lynah*, 188 U. S. 445, 47 L. ed. 539; *U. S. v. Cress*, 243 U.S. 316; *Campbell v. U. S.*, 266 U.S. 368.

The *Cress* case simply follows the *Lynah* case and the issue was not raised in the *Campbell* case, the only question being the amount.

We, therefore, go back to the *Lynah* case. Says the opinion:

“All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the Government had a paramount right to appropriate the property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this government right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation. * * *.

“The action which was taken, resulting in the overflow and injury to those plaintiffs, is not to be regarded as the personal act of the officers,

but as the act of government. That which the officers did is admitted by the answer to have been done by authority of the Government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of government. * * *

Mr. Justice Brewer then quotes in part from *Pumpelly v. Green Bay, etc. Co.*, 13 Wall. 166, 20 L. ed. 557:

“‘It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security *to rights of the individual as against the government*, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of property to the uses of the public, it can * * * subject it to total destruction without making any compensation, * * *. Such a construction would pervert the constitutional provision * * *.’”

Mr. Justice Brewer proceeds:

“But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.”

The above cases indicate the right of the Government

to condemn and take possession under judicial process and the power of the sovereign to take without judicial process. In the latter instance the land owner is relegated to a suit for damages.

In the former instance, having invoked the jurisdiction of the court, the matter of possession and amount is determined in the adversary proceeding of the Government against the land owner.

The jurisdiction of the court having been invoked, that court will determine when possession shall be delivered.

In any and every case where the Government condemns, provision must be made to compensate the land owner. The very purpose of the Declaration and Taking Act was to protect the Government against interest and to give the land owner "immediate cash."

The Government argues that the taking was not arbitrary or capricious (Brief 27).

Bear in mind we are not concerned, on the Government's appeal, with the right to take and condemn this property. We are only concerned with the claim for immediate possession.

Under the Declaration of Taking Act it was the duty of the court to determine when possession should be delivered.

We are not concerned with the "necessity" of the condemnation but only with the claim for immediate possession. On this point, the Government relies on:

(a) *Old Dominion Land Co. v. U. S.*, 269 U.S. 55, 70 L. ed. 162.

The contention in that case was that the taking was

not for a public use and, therefore, the court had no jurisdiction. That case in no wise involved the immediate right of possession but only the fundamental right to take, which Appellees do not question.

(b) *City of Oakland v. U. S.*, 14 F.(2d) 959.

As we heretofore pointed out, the money was deposited in the registry of the court and the court fixed the time of taking.

(c) *U. S. v. 243.22 acres of land*, 129 F.(2d) 678.

The court there entered an order for immediate possession. Jurisdiction was invoked and the court exercised its discretion.

(d) *U. S. v. Montana*, 134 F.(2d) 194.

Again, the question was not immediate possession. The condemnation was based on an adequate promise for payment.

The Government's position in this court is as summarized by the District Judge:

“* * * The Government's position in effect is that, as to administrative acts of Government War Department officials under the Second War Power Act, there is no judicial review except a review which must result in judicial approval, never disapproval, of administrative action. That I believe is not the law. If it were, a citizen would have no relief in any case against arbitrary or oppressive action of administrative officials.” (R. 196)

That same position has been taken by the Government in practically every court in the land under the

terms and provisions of the Emergency Price Control Act.

The latter act provides that:

“Whenever, in the judgment of the administrator, * * * any person has violated Section 4 of the Act * * * he may make application to the appropriate court for an order enjoining such act or practices * * *. A permanent or temporary injunction, restraining order or other order *shall be granted without bond.*”

On February 28, 1944, the Supreme Court of the United States decided *Hecht Co. v. Bowles*, Vol. 88, U.S. Sup. Ct. L. ed. Advance Opinions No. 9, page 465.

Says Mr. Justice Douglas:

“The question in this case is whether the administrator, having established that a defendant has engaged in acts or practices violative of Section 4 of the Act, is entitled *as of right to an injunction*, restraining the defendant from engaging in such acts or practice *or whether the court has some discretion to grant or withhold such relief.*”

It is determined by unanimous court (on this point) that the administrator is not so entitled as a matter of right but that the court, jurisdiction having been invoked, has discretion.

Says the writer:

“We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that ‘An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.’ *Meredith v. Winter*

Haven, 320 U.S. 228, 235, ante, 1, 4, 64 S. Ct. 7. * * *.” The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument of nice adjustment and reconciliation *between the public interest and private needs* as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. * * * Hence we resolve the ambiguities of Section 205 (a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation *in accordance with* their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. * * *

“* * * The administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility.”

Neither does the *Acting* Secretary of War carry the sole burden of the war. The Federal Courts have a share of that responsibility.

The argument of the Government upon this point loses sight of the fundamental proposition that the courts are still a coordinate branch of the Government.

In *Carmack v. U. S.*, 135 F.(2d) 196, the court had for consideration a condemnation proceeding by the United States in the taking of property already devoted to a public use.

The District Court refused to consider whether “the

Government had acted arbitrarily in the selection of the property sought to be condemned.”

Says the opinion, in reversing:

“This issue we think should have been determined by the court. The record shows without dispute that the property has been devoted to public use * * *. This public use may not, as a matter of law, exempt the property from condemnation for another which may be exercised consistently with the present public use or which is of superior rank in respect to public necessity * * *. Public necessity is a relative term. There is no question of the power of the Government to take this property, but there is a question as to whether by a general act it has determined to exercise that power so far as this property, which is already devoted to a public use, is concerned.

* * *

“While the Government as a sovereignty has inherent power to take private property essential to the public welfare, it exercises that power ordinarily pursuant to specific legislation. The right to determine what is a public use and when there is a public necessity for taking specific property is, in the first instance, a legislative rather than a judicial question, *but whether, in carrying out the purpose of Congress, the officer has acted capriciously or arbitrarily is a judicial question.*

* * * That necessity was determined by the acting administrator of Federal works agency, *and whether in determining the issue he acted arbitrarily or capriciously should be decided by the trial court.*”

The *Carmack* case, *supra*, goes further than did the District Court in the instant case. The District Court

denied the Government only the right of immediate possession but not the right to condemn. It found that the Government was, in the circumstances, under the evidence, acting arbitrarily and capriciously.

It follows that the administrative agency of the Government having invoked the judicial processes of the Government and the District Court having jurisdiction to hear and determine, the Government is bound by that determination and the original order denying immediate possession was and is valid.

II.

In the utmost contempt of that order the administrative officers rendered it a nullity insofar as the rights of Appellee are concerning by then seizing possession, using the armed forces of the United States so to do.

In open court counsel for the administrative officers stated that the mandate of the court would not be obeyed (R. 52).

There is involved in this matter of contempt not the issuance of an "injunction," as argued by Appellant, but there is involved only the inherent power of the court to punish for contempt. In the present instance the power was not only inherent in the court but sustained by the governing statute.

However, the claim that an injunction will not issue against the Sovereign was before the court in *Sterling v. Constantin*, 287 U.S. 378, 77 L. ed. 375.

In that case the State was the sovereign and the governor of Texas declared martial law. The power and

authority of the state and the governor are analogous to the power of the United States and an administrative officer thereof.

After reviewing the broadness and necessity of the power of the governor to declare martial law, the opinion states:

“It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. *What are the allowable limits of military discretion*, and whether or not they have been overstepped in *a particular case*, are *judicial questions*.”

Mr. Justice Hughes then quotes with approval from *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75:

“‘Every case must depend on its own circumstances. It is the emergency that gives the right and the emergency must be shown to exist before the taking can be justified’.”

The opinion proceeds:

“The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this court.

“Appellants’ contentions find their appropriate answer in what was said by this court in *Ex parte Milligan*, 4 Wall. 2, 124, 18 L. ed. 281, 296, a statement as applicable to the military authority of the state in the case of insurrection as to the military authority of the nation in time of war.”

In the *Milligan* case, 4 Wall. 2, 124, 18 L. ed. 281, it will be recollected that martial law could not be established at the whim of an officer or with the approval of the Commander in Chief.

The language of *Ex parte Milligan* is as important today as in the day that the writer penned the document.

The *Sterling* case concludes that:

“The matter is one of judicial cognizance.”

The contemptuous violation under the circumstances of this case of a solemn order of the court continued to be a matter of judicial cognizance and of which the court took notice.

The procedure in the contempt proceedings followed the decisions of the Supreme Court of the United States.

Ex parte Terry, 128 U.S. 289, 32 L. ed. 405.

Says Mr. Justice Harlan:

“Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempt of its authority. In *United States v. Hudson*, 11 U.S. 7, Cranch, 34 (3:259), it was held that the court of the United States, from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of order, et. In *Anderson v. Dunn*, 19 U.S. 6 Wheat. 204, 227 (5:242, 247) it was held that ‘Courts of justice are universally acknowledged to have been vested, by their very creation, with power to impose silence, respect and decorum in their presence, and *submission to their lawful mandates.*’ So, in *Ex parte Robinson*, 86 U.S. 19 Wall. 505, 510 (22:205, 207): ‘The

power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of judgments, orders and writs of the court, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power'."

After reviewing other earlier decisions, the court points out that in so far as the Circuit Court is concerned (of course the District Court as well) the power is also granted by statute (R.S. Sec. 725; 1 Stat. 83).

In *Bessette v. Conkey*, 194 U.S. 324, 48 L. ed. 997, it is stated:

"* * * If a party is ordered by the court to abstain from some action which is injurious to the adverse party, and he disobeys that order, he may also be guilty of contempt * * *.

"* * * A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet some times the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

See *In re Debs*, 158 U.S. 564, 39 L. ed. 1092.

In the case at bar counsel for the administrative officers stated in open court that the mandate of the court, to-wit: refusal of immediate possession, would not be obeyed. With the armed forces of the United

States and in absence of martial law, the mandate was not obeyed.

Appellant was a "party" to the very action pending.

The District Court had power to hear and punish not only under the governing statute but under its inherent power.

It is true that that order denying immediate possession did not specifically direct the appellant to do or not to do anything. The order denied immediate possession upon the application made.

Manifestly, the effect of the order was to say to Appellant: "You do not now obtain possession and you shall not interfere with the possession of the land owner." That is the order which the individual officers of the Government, cited to show cause why they should not be punished for contempt, deliberately disobeyed.

That appellants were not acting upon their own initiative is manifest because both in the District Court and in this court the Government has adopted their acts and now endeavors to sustain them in their unlawful possession.

We refer again to *Luckenbach Steamship Co. v. Norwegian Barque Thekla*, 266 U.S. 327, 69 L. ed. 313,

The Government there contended:

"that there is no statute by which the Government accepted this liability."

Said the court:

"It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

In the instant case the Government has gone farther and accepted and attempts to sustain the wrongful act of the executive in violation of the court order in a cause then pending and in which the Government was the original moving party.

It follows that Appellant having invoked the jurisdiction of the District Court, as it had a right to do, and by orderly procedure having sought an order for immediate possession, and the court having jurisdiction, and having heard and determined that matter, its order denying immediate possession was valid.

It follows that the action then taken by Appellant in violation of that order and seizing the property necessarily invoked the inherent power of the court to determine the matter of contempt.

In the original condemnation proceedings the Government proceeded to invoke jurisdiction under both its power and its right; having gone into court, it remained in court, and it could not lawfully disregard a lawful order of the court.

The District Court determined that the individuals should not be punished for contempt but that the Government, being the actual party and having adopted the acts of its agents, should be required to pay compensation by way of contempt damages to the land owner for the period of time in which it wrongfully withheld the property in violation of its lawful order.

The Appellant suggests that actually it did not violate the order in taking immediate possession but waited a few days.

The original order was in full force and effect and

the action pending. Appellant was still before the court.

By disregarding and disobeying the valid court order, the Government did a wrong to Appellees. This is a court of equity. Every wrong has a remedy. What is the remedy here?

The United States cannot be brought physically into a court. It can respond in a way to compensate those it has wronged. That is to assess damages as for contempt and award those damages to the injured parties. That is what the District Court did.

III.

The record amply sustains the Findings of Fact (R. 12) of the District Court.

It is conceded that no other warehouse property was available for the use of Appellee and the Government theretofore condemned and had taken warehouse after warehouse property and renovated the buildings and was then renovating warehouse buildings into office space.

It is suggested that the District Court erred in denying the Government's motion for leave to reopen the case.

The District Court, in passing upon that motion, stated:

"I get the impression from the evidence in this case that the Government has been rather strong on acquiring property and using it for office use * * *. I believe, gentlemen, that that is the evidence that is the most weighty of all in this case in influencing the court's decision as announced.

“So, in view of the statements that have been made by counsel seeking the opportunity of introducing further evidence as well as all counsel opposed to that * * * the request is denied.” (R. 192)

The evidence offered was only cumulative and therefore there was no reason why the court should have accepted it.

Such determination was within the wise discretion of the Trial Court and should not be overruled unless clearly exercised improperly.

Commercial Station P. O. v. U. S., 48 F.(2d) 183.

THE CROSS APPEAL

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over the subject matter.
2. Whether the District Court erred in dismissing contempt proceedings against the individual persons.

SPECIFICATIONS OF ERROR

The District Court erred:

I.

In denying the motion of Appellees to dismiss, pursuant Rule 12-B, because:

(a) The court did not have jurisdiction over the subject matter for the reason that the action was instituted pursuant to a request only of the *Acting* Secretary of War;

(b) Because the statement of the estate or interest in said lands which it is sought to take is not sufficiently described and set out.

II.

In dismissing the contempt proceedings against the individuals cited.

ARGUMENT

The request to condemn and to obtain an order of immediate possession came from only the "*Acting* Secretary of War." There is no such officer as the "*Acting*" Secretary of War.

There is a Secretary of War, of which the courts will take judicial notice.

R. S. 214 (5 U.S.C.A. 181) (Act of August 7, 1789) establishes an executive department "to be known as the Department of War, and a Secretary of War who shall be the head thereof."

By the Act of March 5, 1890, C. 26 Statute 17 (5 U.S.C.A. 182) there was established the office of "Assistant Secretary of War."

By the Act of December 16, 1940, C. 931, Sec. 1, 54 Stat. 1224 (5 U.S.C.A. Appendix 181 A) there was established the office of "Under Secretary of War."

"The Under Secretary of War shall perform such duties as may be prescribed by the Secretary of War or required by law and shall be next in succession to the Secretary of War during his absence or disability or in the event of a temporary vacancy in that office."

By the Act of June 3, 1916, C. 134, Sec. 5 a. 44 Stat. 784 (5 U.S.C.A. Appendix 182 A) there was established an "Additional Assistant Secretary of War."

Congress, through the years, as necessity required, has provided for an Assistant Secretary of War, an Under Secretary of War, and an Additional Assistant Secretary of War.

The Under Secretary of War is next in line.

Congress has never designated an "*Acting*" Secretary of War .

The request, then, to the Attorney General from an "Acting" Secretary of War was not a request from a properly designated official of the War Department; was a nullity; and Cross-Appellees' Motion to Dismiss should have been granted.

II.

The Petition in Condemnation sought to condemn "a term of years ending June 30, 1944"—that is a period less than one year.

Whatever rights are sought to be appropriated must be taken absolutely and unconditionally. 18 Am. Jur. 741. Note 2.

Here, the attempt to take part of the lease manifestly destroyed the lease in its entirety. The face of the Petition in Condemnation did not, then, sufficiently describe the property to be taken. It did not contain "a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken" and did not pay into the registry of the court any money at all.

The Petition did not conform to the Declaration of Taking Act of February 26, 1931, and that portion of the Declaration of Taking Act was in no wise modified by the Second War Powers Act of March 27, 1942.

The Motion to Dismiss should have been granted.

III.

The individuals cited for contempt, being members of the War Department, were acting as agents of the War Department. They were the executive officials who deliberately violated the order of the court. Through their counsel they stated in open court that they would violate that order and they did violate it. They used the armed forces of the United States, subject to their control, in defiance of the Federal courts.

Those officers, so acting, were the Honorable Henry L. Stimson, Secretary of War; the Honorable Robert P. Patterson, Under Secretary of War; Sherman B. Green, Chief Seattle Sub-Office for the Division of Engineers, and Major S. N. Tideman, Jr., the officer in charge of the armed personnel that physically seized possession.

The War Department, in the District Court, asserts that these officers had power to act and did act. The Government has adopted and endeavors to sanctify their action and each, individually, personally and deliberately, violated the order of the court.

Under the cases cited in support of punishment for contempt, *supra*, each was and is guilty of contempt.

See also:

Cyclopedia of Federal Procedure, Sec. 1119,
Vol. 4, page 259; Vol. 7, Chapter 83, Sec.

3730, page 791 *et seq.*;

28 U.S.C.A. 385. Notes 21, 22 and 23.

The District Court should have found the individuals guilty of contempt. They knew of the order which, by denying possession, in effect directed the officers of the Government not to take possession. These officers did take possession, thereby wilfully violating the order of the court.

The court had the inherent right to enforce its orders and thus could and should have adjudged these cited officers in contempt.

These officers, except in taking the power into their own hands irrespective of their having theretofore invoked the jurisdiction of the court, were actually proceeding under the authority only of the *Acting* Secretary of War pursuant the order of July 29, 1943.

No claim is made that the Secretary of War or any proper officer of the War Department thereafter issued a new order or directive.

The only claimed directive was that of Sherman B. Green "dated" (R. 30). Even this directive refers to and is based upon the original condemnation proceedings of "Second day of August, 1943," in which the Government invoked the jurisdiction of the court.

While the Secretary of War has the power to determine such property as may be necessary to be condemned and taken, certainly there is required an official act upon his part or through his deputies in that particular. In the instant case we have only the or-

iginal directive through which jurisdiction was not only invoked but in which it was specifically directed that jurisdiction should be invoked.

The acts of these officers subsequent thereto, in defiance of the court order, might well constitute a trespass upon their part were it not for the fact that the Government has accepted and is endeavoring to validate their personal action and acts.

If, for some reason, an Appellate Court should hold that the Government, as such, was not in contempt and subject to contempt damages, in that these individuals acted on their own initiative and not "as the Government" but as individual trespassers, it becomes quite important, then, to hold them individually in contempt, and for that reason this Cross-Appeal is made necessary; otherwise, the land owner and lessee would be without remedy.

It is also important to the court, in the attack that was deliberately made upon its dignity and in violation of its legal orders, that the administrative officers render respect and obedience to that court and not disregard and disobey.

We respectfully submit that upon the Government's appeal the carefully considered and able opinion of the courageous Trial Judge should be affirmed. His careful analysis and weighing of the facts does not warrant reversal and his sound conclusions as to the law are amply supported in the governing decisions and the statutes. If affirmed, little attention need be paid to the Cross-Appeal, except as the contempt of

the individuals affects the dignity of the court, but if error is found, then the land owner and tenant should prevail upon their Cross-Appeal.

Respectfully submitted,

RUMMENS & GRIFFIN,

*Attorneys for Merchants Transfer & Storage
Co., a corporation, Appellee.*

LEWIS L. STEDMAN,

*Attorney for Skinner & Eddy Corporation, a
corporation, and Lewis L. Stedman, Liqui-
dating Trustee of Skinner and Eddy Ship-
building Company, a dissolved corporation,
Appellees.*

No. 10573

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

MERCHANTS TRANSFER & STORAGE CO. ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

F. P. KEENAN,
Special Assistant to the Attorney General.

NORMAN MacDONALD,
Attorney, Department of Justice,
Washington, D. C.

FILED

APR 17 1944

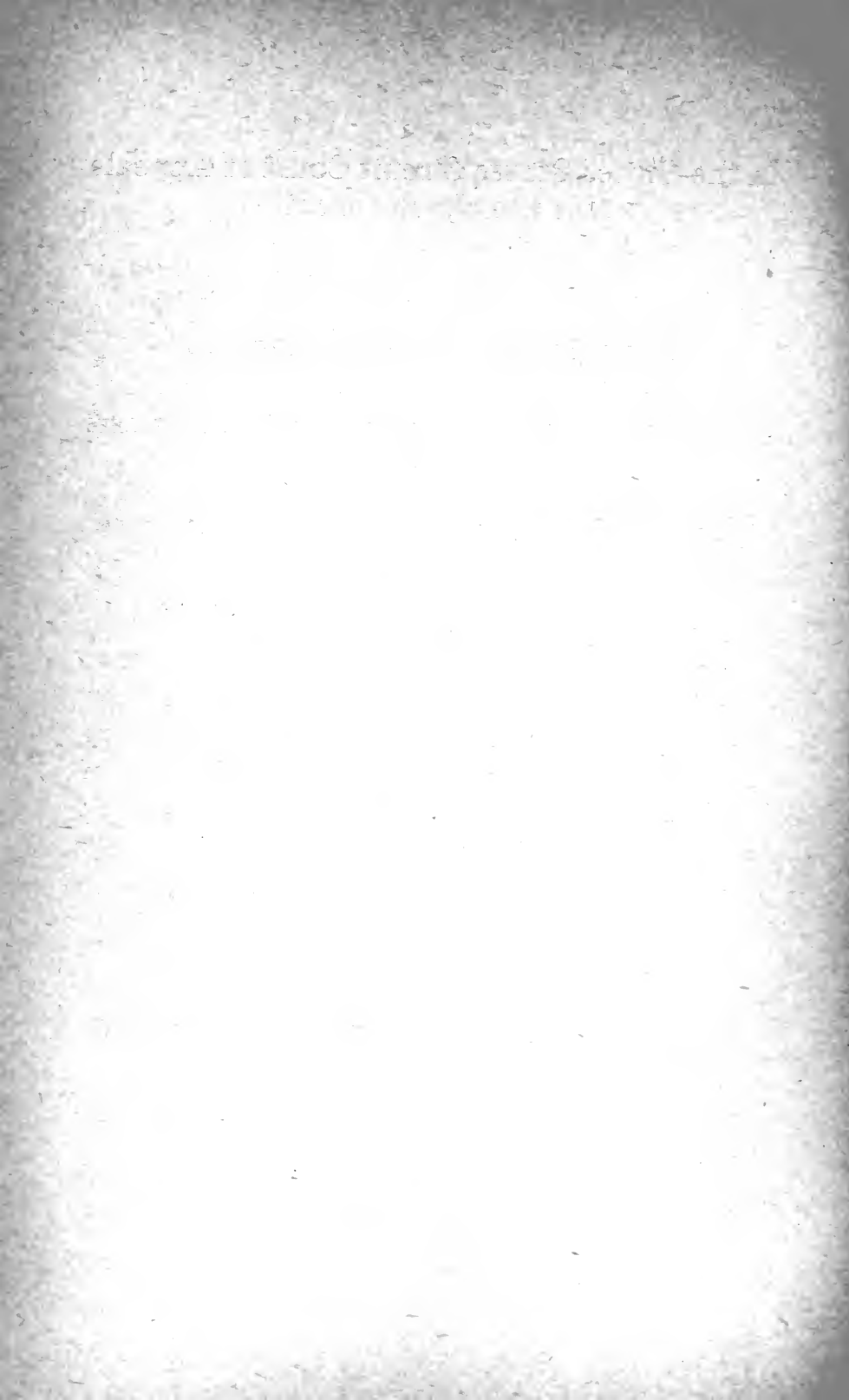
PAUL P. O'BRIEN,
CLERK

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In the United States Circuit Court of Appeals for the Ninth Circuit

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Herein the Government will reply to the arguments advanced by the appellees in their brief in support of the order of September 21, 1943 (R. 51-52) requiring the United States forthwith to return possession of the property. It will also answer their argument in support of their cross-appeal.

ARGUMENT

I

The district court lacked jurisdiction to order the United States to surrender possession under penalty of damages "as for contempt"

Appellees argue that the district court's jurisdiction to enter the order of September 21, 1943 (R. 51-52) follows from its jurisdiction in condemnation which was invoked by the United States (Br. 6-7). How-

ever, jurisdiction of condemnation proceedings is one thing and jurisdiction of proceedings against the United States for the purpose of requiring it to return possession of property under penalty of damages "as for contempt," an entirely different thing. The fatal objection in the latter case, as was pointed out in the opening brief (pp. 17-19), is the fact that the United States, which, of course, can never be sued without its consent, has never consented thereto. The *Thekla* case, 266 U. S. 327 (1924), relied upon by appellees (Br. 6), which was decided at the same term as the *Nassau Smelting Works* case, 266 U. S. 101 (1924) (see Op. Br. p. 18), has since been limited to admiralty suits. *United States v. Shaw*, 309 U. S. 495, 502-503 (1940). See also *United States v. Davidson*, 139 F. (2d) 908 (C. C. A. 5, 1943).

II

The United States is authorized to take possession of property without court order

Appellees contend in effect (Br. 5-20) that, the United States having sought and been denied a court order for immediate possession, it became bound and could not thereafter take possession of the property even if under the Second War Powers Act or otherwise it is authorized to do so without court order. This argument quite overlooks that the only effect of the denial of court order for immediate possession was to deny the United States the right to take possession under court order. The denial of the court order left the United States free to take possession thereafter without a court order if it had the authority to do so.

The Government's opening brief (pp. 19-27) shows that the United States was authorized to take possession of the property without court order, and this appellees have not refuted. Appellees' argument also very largely blinks the fact that the United States took possession of the property on September 8, 1943 (R. 25). Clearly, a denial of court order for immediate possession made on August 13, 1943 (R. 22) could not preclude the United States from taking or affect its right to take possession of the property on September 8, 1943—almost a month later—if, as was shown in the opening brief and as appellees' argument virtually admits, the United States had authority to take possession without court order. See opening brief, pp. 35-37.

Like the court below, appellees are of the erroneous belief that a taking is not valid if not preceded by payment or deposit of compensation (Br. 8-9, 10-16). This view fails to take into consideration the facts (1) that the requirements of the Constitution are wholly satisfied when provision for the payment of just compensation is made in advance of a taking, and (2) that the filing of the petition in condemnation herein constitutes such provision. See opening brief, pp. 23-25.

III

The taking of possession was not arbitrary and capricious

Appellees assert (Br. 26-27) that the findings of the court below sustain its judgment that the taking of possession was arbitrary and capricious. However, they make no attempt to refute the Government's contention (Br. 27-33) that while the district court pur-

ported to determine whether the taking of possession was arbitrary or capricious, it in fact merely substituted its determination as to the necessity for the taking for that of the Secretary of War. That the taking was not arbitrary or capricious, the findings of the court below to the contrary notwithstanding, is amply shown in the Government's opening brief (pp. 33-37).

IV

The cross-appeal must fail

Cross-appellants appealed from "that portion of the order designated as 'Order Directing Return of Property' entered September 21, 1943, * * * which ordered and decreed that [certain designated officials] were not in contempt of the Court * * *'" (R. 57-58). The court below allowed the cross-appeal from that portion of that order only (R. 58-59). Cross-appellants argue (Br. 28-30) that their motion to dismiss (R. 11-12) the condemnation proceedings should have been granted. But since the court below has not yet acted on their motion to dismiss (R. 22), and therefore the cross-appeal necessarily is only from a certain portion of the order of September 21, 1943, the cross-appeal manifestly brings before this Court no question as to the merits of the motion to dismiss the condemnation proceedings. Cross-appellants' other contention (Br. 30-33) that certain officers of the United States should have been held in contempt of the order of August 13, 1943, denying immediate possession, must fail for the same reasons which apply in the case of the United States. See opening brief, pp. 19-37.

CONCLUSION

The order below of September 21, 1943, should be reversed insofar as it purports to control the United States, the injunction against the United States revoked, and the cause remanded with directions to determine compensation for the property taken. The order should be affirmed insofar as it determined that designated officials of the United States should not be held in contempt.

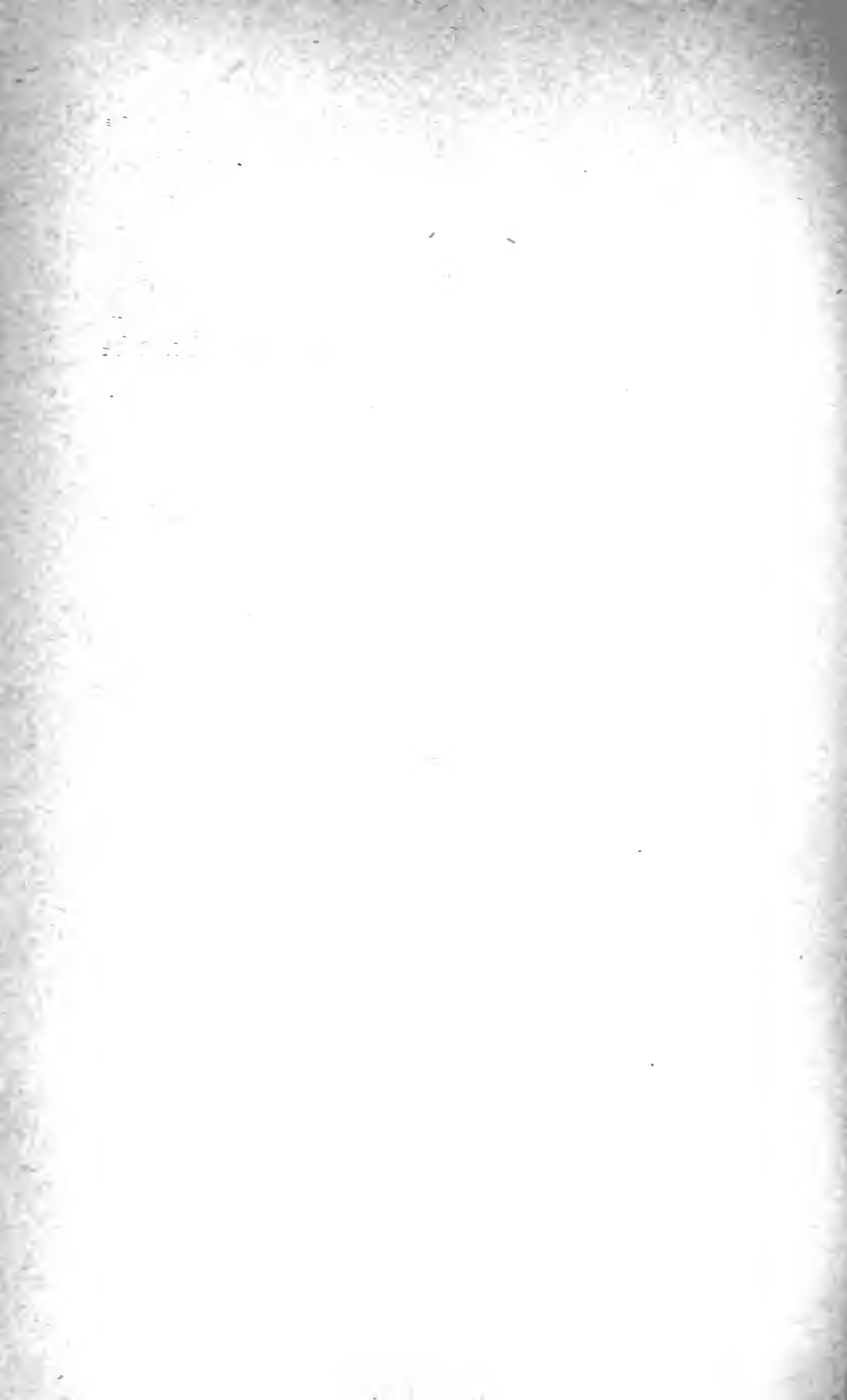
Respectfully submitted.

NORMAN M. LITTELL,
Assistant Attorney General.

F. P. KEENAN,
Special Assistant to the Attorney General.

NORMAN MACDONALD,
Attorney, Department of Justice,
Washington, D. C.

APRIL 1944.



No. 10593

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Southern Division

FILED

FEB 16 1944

PAUL B. DUNN,
CLERK

No. 10593

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN S. COOPER

304 S. Broadway
Los Angeles 13, Calif.

For Appellee:

CHARLES H. CARR,

United States Attorney

WALTER S. BINNS,

Assistant United States Attorney

600 U. S. Post Office and
Court House Bldg.
Los Angeles 12, Calif. [1*]

No. 6776

Filed. Jun 30 1943

Viol.: 21 USC 174

18 USC 88

Conspiracy to import and conceal narcotics

In the District Court of the United States in and
for the Southern District of California, South-
ern Division

January, 1943, Term

INDICTMENT

In the Name and by the Authority of the United
States of America, the Grand Jury for the Southern
District of California, at Los Angeles, presents on
oath in open Court:

That

KATHERINE WILSON,
FRANK KRAMER, and
EDGAR WALLACE,

hereinafter called the defendants, on or about April
27, 1943, at San Ysidro, San Diego County, Cali-
fornia, division and district aforesaid, did then and
there knowingly, wilfully, unlawfully, feloniously
and fraudulently import and bring into the United
States of America from a foreign country, to-wit:
the Republic of Mexico, certain narcotic drugs, to-
wit: approximately 8 ounces of smoking opium,
contrary to law;

Contrary to the form of the statute in such case
made and provided and against the peace and dig-
nity of the United States of America.

COUNT TWO

And the Grand Jury further presents on oath in open Court:

That

KATHERINE WILSON,
FRANK KRAMER, and
EDGAR WALLACE, [2]

hereinafter called the defendants, on or about April 27, 1943, at San Ysidor, San Diego County, California, division and district aforesaid, did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain preparation of opium, to-wit: approximately 8 ounces of smoking opium, which said preparation of opium, to-wit: approximately 8 ounces of smoking opium, as said defendants then and there well knew, had been imported into the United States of America contrary to law; Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE

And the Grand Jury further presents on oath in open Court;

That

KATHERINE WILSON,
FRANK KRAMER, and
EDGAR WALLACE,

hereinafter referred to as the defendants, prior to the dates of the commission of the overt acts hereinafter set forth, and continuously thereafter to and including the date of finding and presentation of this indictment, in Los Angeles County, California, and continuing in San Diego County, California, within the division and district aforesaid, did then and there knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate, arrange and agree together and with each other, and with divers other persons whose names are to the Grand Jury unknown, to commit certain offenses against the United States of America and the laws thereof, the offenses being all of the offenses hereinbefore in this indictment charged, that is to say, all of the offenses charged against the defendants in the first two counts of this indictment contained: [3]

And the Grand Jury upon its oath aforesaid does further charge and present that at the hereinafter stated times in pursuance of, and in furtherance of, in execution of, and for the purpose of carrying out and to effect the object, design and purposes of said conspiracy, combination, confederation and agreement aforesaid, the hereinafter named defendants did commit the following overt acts at the hereinafter stated places:

(1) On or about April 26, 1943, defendants Katherine Wilson, Frank Kramer and Edgar Wallace, together with Rose Kramer and Gertrude Irwin, left Los Angeles, California, in a 1942 Ford Sedan automobile for San Diego, California;

(2) On or about April 27, 1943, at San Diego, California defendant Frank K r a m e r obtained \$240.00 in \$2 bills at the Fifth and Market Branch of the Bank of America;

(3) On or about April 27, 1943 defendants Katherine Wilson, Frank Kramer and Edgar Wallace, together with Rose Kramer and Gertrude Irvin went to Tijuana, Mexico;

(4) On or about April 27, 1943, at San Ysidor, California, defendant Katherine Wilson concealed 8 ounces of smoking opium in one can on her person;

(5) On or about April 27, 1943, at Tijuana, Mexico, defendant Frank Kramer delivered one can containing 8 ounces of smoking opium and two hypodermic needles to defendant Katherine Wilson.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHARLES H. CARR

United States Attorney

A true bill.

D. BLAINE MORGAN

Foreman.

[Endorsed]: Filed Jun 30 1943. [4]

At a stated term, to-wit: The January Term, A. D. 1943, of the District Court of the United States of America, within and for the Southern

Division of the Southern District of California, held at the Court Room thereof, in the City of San Diego on Friday the 9th day of July in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Leon R. Yankwich, District Judge

No. 6776-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KATHERINE WILSON, FRANK KRAMER,
and EDGAR WALLACE,

Defendants.

PLEA OF NOT GUILTY

This cause coming on for arraignment and plea of the defendants Katherine Wilson, Frank Kramer and Edgar Wallace; Robert Burch, Jr., Esq., Assistant U. S. Attorney, appearing for the Government; Edgar G. Langford, Esq., appearing as counsel for the defendant Wilson for arraignment only, and for the defendant Edgar Wallace; George Shreve, Esq., appearing as counsel for the defendant Frank Kramer; Eloise Moeller, Court Reporter, being present and reporting the proceedings; the said defendants being present in Court; each defendant separately states his or her true name to be as charged in the indictment, waives the reading

of the indictment, and enters plea or not guilty to the charges contained in the indictment. It is ordered that this cause be, and it hereby is, set for trial for August 3, 1943. Attorney Langford states the defendant Wallace will waive jury trial. [5]

At a stated term, to-wit: The July Term, A. D. 1943, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of San Diego on Friday the 8th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Ralph E. Jenney, District Judge

No. 6776-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KATHERINE WILSON and

FRANK KRAMER,

Defendants.

TRIAL

This cause coming on for further trial as to the defendant Frank Kramer; Robert B. Burch, Jr., Esq., appearing as counsel for the Government; John S. Cooper, Esq., appearing as counsel for defendant Kramer; Eloise Moeller, Court Reporter, being present and reporting the proceedings; the defendant Frank Kramer being present in Court:

Edgar Wallace is called, sworn, and testifies on direct examination by Attorney Cooper.

Rose Kramer is called, sworn, and testifies for the defendant.

Frank A. Kramer is called, sworn, and testifies in his own behalf.

At 10:34 A. M. the defendant Kramer rests.

K. G. Linden is called, and having been previously sworn, testifies further on rebuttal for the Government.

The Government rests.

At 10:40 A. M. Court recesses and reconvenes at 10:43 A. M.; all present as before; it is ordered that counsel proceed.

Attorney Burch argues to the Court for the Government.

At 11 A. M. Attorney Cooper argues to the Court for the defendant.

At 11:25 A. M. Attorney Burch makes closing argument to the Court for the Government.

The Court finds the defendant Kramer guilty on all three counts of the indictment and orders the defendant released on his own recognizance until 9:50 A. M. October 12, 1943. [6]

At a stated term, to-wit: The July Term, A. D. 1943, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 18th day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable: Ralph E. Jenney, District Judge.

No. 6776-Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KATHERINE WILSON and
FRANK KRAMER,

Defendants.

ORDER DENYING MOTION
FOR NEW TRIAL

This cause coming on for hearing on motion for new trial as to the defendant Frank Kramer, and sentence of the defendants Katherine Wilson and Frank Kramer; James M. Carter, Esq., Assistant U. S. Attorney, appearing for the Government; John S. Cooper, Esq., appearing for the defendant Kramer; Horace Appel, Esq., appearing for the defendant Wilson; Samuel Goldstein, Court Reporter, being present and reporting the proceedings; the said named defendants being present in court:

Attorney Cooper makes a statement.

Katherine Wilson is called, sworn, and testifies at the request of the Court re motion for a new trial on the part of defendant Kramer.

Attorney Cooper argues in support of said motion.

The motions for a new trial, to set aside verdict, and to vacate are ordered denied.

The Court pronounces judgment against the defendant Kramer as follows:

* * * * *

Attorney Cooper informs the Court that he has prepared a notice of appeal and requests that bond on appeal be fixed in the sum of \$2500.00, and counsel for the Government interposing no objections thereto, it is so ordered, subject to the defendant remaining in the custody of the U. S. Attorney pending the approval and filing of said bond.

It is further ordered that sentence of the defendant Katherine Wilson go over until next Monday, October 25, 1943, at 10 A. M. [15]

District Court of the United States, Southern District of California, Southern Division

No. 6776 Criminal Indictment
in three counts for violation of U. S. C.,
Title 21 USC 174; and 18 USC Secs. 88.

UNITED STATES

v.

FRANK KRAMER

JUDGMENT AND COMMITMENT

On this 18th day of October, 1943, came the United States Attorney, and the defendant Frank

Kramer appearing in proper person, and by counsel, John S. Cooper, Esq., and

The defendant having been convicted on a verdict of guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: importation; transportation and concealment after importation of smoking opium, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative on count one; for a period of two (2) years in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative on count two, said sentence of imprisonment to begin and run concurrently with sentence on count one; and, for a period of two (2) years in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative on county three; said sentence of imprisonment to begin and run concurrently with sentence imposed on count one.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment

to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) RALPH E. JENNEY

United States District Judge.

The Court recommends commitment to

[Endorsed]: Filed Oct 18 1943 [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant:

Frank Kramer, present address 16232 Cantlay Street, Van Nuys, California.

Name and Address of Appellant's Attorney:

John S. Cooper, Attorney at Law, 304 South Broadway, Los Angeles, California, Telephone Madison 5887.

Offense:

The Defendant was indicted and charged with three counts in the indictment. Count I: Importation of smoking opium from a foreign country—violation 21 U.S.C. 174. Count II: Receiving, buying, transporting after importation opium—violation 21 U.S.C. 174. Count III: Conspiracy with other persons to import and conceal narcotics;—violation 18 U.S.C. 88.

Date of Judgment:

The judgment in this case was made and pronounced on the 12th day of October, 1943, by the Honorable Ralph Jenney.

Brief Description of Judgment or Sentence:

The verdict and decision of the Court in this case found the Defendant guilty of Counts 1, 2 and 3 as charged in the indictment. A motion for a new trial was made and denied and the Defendant was sentenced to 2 years Count 1; 2 years Count 2; 2 years count 3; sentence on Count 2 and 3 to run concurrently with the sentence on Count 1. [17]

Name of Prison:

The Defendant was remanded to the custody of the Marshall; bond on appeal was fixed in the sum of \$2500.00 and Defendant is now on bond.

APPEAL

I, the above named appellant hereby appeal to the United States Circuit of Appeals for the Ninth District from the judgment and sentence above mentioned on the grounds set forth below, to-wit:

1. From the order denying the motion for a new trial.
2. From the judgment and sentence herein and each and every count thereof, and he specifies generally that the grounds of his appeal are as follows:
3. That the Court erred in overruling his demurrer to the evidence at the close of the case for the Government and dismissing the case at that point.

4. That the verdict and decision in this case is contrary to the law and contrary to the evidence and said judgment and verdict is not supported by the evidence nor is there sufficient evidence to sustain any count of said indictment.

5. That the court erred in *deying* Defendant's motion for a new trial.

That said Appeal would be taken upon a Bill of Exceptions and other records to be hereafter prepared, served and filed and upon the records and files of this case, and such records and files as are proper under the rules of Appeals in Criminal Cases.

FRANK KRAMER

Appellant.

JOHN S. COOPER

Attorney for Appellant,
Frank Kramer.

Dated: October 18, 1943.

Received copy of the within Notice of Appeal this 18th day of October, 1943.

CHARLES H. CARR

U. S. Atty

By JAMES M. CARTER

Asst U. S. Atty

Attorney for plaintiff

[Endorsed]: Filed Oct 18 1943. [18]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

824-0016

Know All Men by These Presents:

That we, Frank Kramer, as Principal, and the Northwest Casualty Company, a Washington Corporation, a surety, are jointly and severally held firmly bound unto the United States of America in the sum of Twenty-Five hundred (\$2500) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 18th day of October, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Southern Division, in an action pending in said Court in which the United States of America is Plaintiff, and Frank Kramer was Defendant, judgment and sentence was made, given, rendered and entered against the said Defendant in the above entitled action, whereas he was convicted as charged in the indictment;

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Frank Kramer, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institu-

tion of the penitentiary type, to be designated by the Attorney General or his Authorized representative for a period of Two years.

Whereas, the said Frank Kramer, has filed notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Frank Kramer, has been admitted to bail pending the decision on said appeal, in the sum of Twenty five [19] hundred (\$2500) Dollars.

Now Therefore, the conditions of this obligation are such that if said Frank Kramer shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Frank Kramer shall abide by and obey Court orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Frank Kramer shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Frank Kramer will appear for trial in the District Court of the United States, in and for the Southern District of California, Southern Division, on such day or days as may be appointed for retrail by said District Court, and if the said judgment and sentence against him be reversed, then this obligation shall

be null and void; otherwise to remain in full force and effect.

This Recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 13 of the District Court.

FRANK KRAMER

Principal

Address—16232 Cantlay St.

[Seal]

NORTHWEST CASUALTY
COMPANY, a Washington
Corporation

By A. W. APPEL

Its Attorney-in-Fact
Surety.

State of California,

County of —ss.

On this 18th day of October, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company, a Washington corporation, to [20] me personally known to be the individual and officer described in and who executed the within instrument, and he acknowledged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and sub-

scribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles County of Los Angeles, the day and year first above written.

[Seal]

MARVA WEEDE

Notary Public in and for the County of Los Angeles, State of California.

Approved as to Form

JAMES M. CARTER

United States Attorney

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

JOHN S. COOPER

Attorney for Defendant and
Appellant.

The foregoing bond is approved this 18th day of October, 1943.

RALPH E. JENNEY

United States District Judge.

[Endorsed]: Filed Oct 18 1943. [21]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
BILL OF EXCEPTIONS

Notice of Appeal having been filed in the above entitled matter, and good cause appearing therefor,

It Is Hereby Ordered that the Defendant, Frank Kramer, have ninety days from and after this date in which to prepare, serve and file a Bill of Exceptions to be used upon the Appeal in this matter.

Dated at Los Angeles, California, Oct. 18th, 1943.

RALPH E. JENNEY

District Judge of U. S. Court.

[Endorsed]: Filed Oct 18 1943. [22]

In the United States District Court, Southern District of California, Southern Division

No. 6776-Crim.

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

PRAECIPE

To the Clerk of the United States District Court:

In order to properly prepare the transcript on appeal you are hereby directed to include therein:

1—The indictment of the defendant and his plea thereto;

2—The decision of the court after the trial of the action;

3—The motion for a new trial and the amended motion for a new trial;

4—The judgment of the court;

5—The notice of appeal and the order allowing the appeal;

6—Bond on appeal of the defendant;

7—The bill of exceptions as settled and allowed by the court;

8—Citation on appeal.

The clerk in preparing the transcript pursuant to the rules of the Circuit Court of Appeals is requested not to duplicate the papers on file.

JOHN S. COOPER

Attorney for Frank Kramer.

It is hereby stipulated and agreed that the above papers which are on file in the office of the Clerk of the District Court constitute the record upon which the Appellant will rely. There [23] being included therewith one paper which is termed an assignment. If such paper is evidence it is stipu-

lated that it may be used and included in the record on appeal.

JOHN S. COOPER

Attorney for defendant and
appellant, Frank Kramer.

CHARLES H. CARR,

United States Attorney,

JAMES M. CARTER,

Assistant United States Att'y

WALTER S. BINNS,

Assistant United States Att'y

By WALTER S. BINNS

Attorneys for the United
States of America

[Endorsed]: Filed Jan 17 1944. [24]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 24 inclusive contain full, true and correct copies of: Indictment; Minute Orders Entered July 9, 1943 and October 8, 1943 respectively; Motion to Vacate and Set Aside Verdict or Decision and Grant a New Trial; Amendment to Motion to Vacate and Set Aside Verdict or Decision and Grant a New Trial; Minute Order Entered October 18, 1943; Judgment and Commit-

ment; Notice of Appeal; Bail Bond on Appeal; Order Extending Time to File Bill of Exceptions and Praecipe, which, together with the Original Bill of Exceptions and Specifications of Errors transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21 day of January, 1944.

[Seal] EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk

In the United States District Court Southern
District of California, Southern Division

No. 6776—Criminal

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

BILL OF EXCEPTIONS

Bill of exceptions of the defendant, Frank Kramer, to be used on appeal from the judgment

herein, and for all purposes for which a bill of exceptions may properly be used:

Be it remembered, that the above entitled action was brought on regularly for trial, and was tried before the Honorable Ralph E. Jenney, judge, jury being waived. The trial commenced Thursday, October 7th, 1943, and the hearing of evidence both oral and documentary for both plaintiff and defendant continued to and including Friday, October 8th, 1943, and the judge having heard the arguments of counsel for both plaintiff and defendant, rendered his verdict therein on the 8th day of October, 1943. Assistant United States Attorney Robert B. Burch appeared as attorney for plaintiff and Messrs. George H. Shreve and John S. Cooper appeared as attorneys for defendant. The following are the proceedings which took place on and during the trial:

JOSEPH ZUNG

called as a witness on behalf of the plaintiff being sworn, testified:

Direct Examination

That he was a manager of banking for the Bank of America, 5th and Market Branch, San Diego; that he identified both the defendants Edgar Wallace and Frank Kramer; he had known the defendant Wallace [1*] for some time; that he saw both of the defendants on the 27th day of April, 1943; Defendant

*Page numbering appearing at foot of page of Bill of Exceptions.

(Testimony of Joseph Zung.)

Wallace had approached him some time before in regards to financing an automobile, and after seeing his credit record, and it seemed to be O.K. he told him that he would. And the particular car he was looking at after that time he decided not to buy, and he just dropped the subject, and some weeks later, which was the day they came to the bank there, they had another car they wanted financed, and it was around 10:00 o'clock, just after they opened the doors that morning, and the two defendants talked to him about the car. But the conditions were such that he could not finance the car, and they said if they could arrange it they would come back, and that nothing was said about changing money.

Cross Examination

Witness Joseph Zung testified: That Wallace had talked to him before about financing a car; that on the 27th day of April defendants Wallace and Kramer came in and they said that they had the car with them and they wanted him, as the manager of the bank, to arrange to finance that car; defendant Wallace told him how much he had to pay down on the car at that time, and it wasn't sufficient; that when he could meet the payment they would finance the rest of the car; defendant Wallace said he would see him later about it. There had been some discussion with one of the Bank of America men in Los Angeles, about a previous car; that he had not seen Kramer until that morning when he came in the bank. He did not remember how much money

(Testimony of Joseph Zung.)

Mr. Wallace stated he had at that time and he did not remember what the purchase price of the car was; that the only object of the discussion was the financing of this automobile.

DOROTHEA T. BULLOCK,

called as a witness by and on behalf of the plaintiff, being sworn, testified: [2]

Direct Examination

That she was a teller at the Bank of America at 5th and Market, San Diego; that she believed that she saw Mr. Wallace at the Bank on the 27th day of April. He came to her to exchange some money for \$2.00 bills and she believed she changed about \$240.00. She did not remember seeing Mr. Kramer.

Cross Examination

Miss Bullock testified: that the only transaction she had concerning \$2.00 bills was with Mr. Wallace; that her principal occupation in the bank was the duties of a teller—she would take the deposits and cash checks and exchange money for \$2 bills; she did not remember how many transactions she had on the 27th day of April; she believed the bills she changed for Mr. Wallace were mostly \$10's and \$20's, but she was not certain; she imagined she gave them to him in a package of 100, and a package of 50 and then some loose ones; that she had to take some out of the vault and she got \$50.00 from

(Testimony of Dorothea T. Bullock.)

another teller; they kept a record of that transaction, and she had some loose \$2's, which brought it up; she did not remember how much money she started the morning's business with; they start the next day's work with the amount of cash they had on hand the night before; she did not handle Mr. Wallace's account there at the bank; she did not know for sure whether he had an account at the bank; she did not remember having seen Mr. Wallace before that day; she had been working at the bank four months prior to the 27th day of April.

Redirect Examination

Miss Bullock testified that a picture of Mr. Wallace was shown her next day, the 28th, and she was asked about him.

KATHERINE WILSON

called as a witness by and on behalf of the plaintiff testified:

Direct Examination

That she lived in Los Angeles; she knew the defendant Kramer not too [3] well, she had known him about seven or eight months; she also knew his wife and the defendant Wallace; she had known defendant Wallace about two years, or more; and that she was acquainted with Mrs. Wallace—she had known her for a long time. She came to San Diego about the 26th day of April with Mrs. Irvin, Mr. and Mrs. Kramer and Mr. and Mrs. Wallace.

(Testimony of Katherine Wilson.)

She lived with Mrs. Irvin in Los Angeles. They arrived in San Diego by automobile some time in the early morning of the 27th; that the Wallace's have a home in San Diego and they all stayed there. The next day Mrs. Kramer wanted to go shopping and so they went over across the line to get some stockings and other things she said she wanted to buy for her house. Mrs. Wallace did not go. Mr. and Mrs. Kramer and Mrs. Irvin, Mrs. Wallace and she went; she imagined they reached Tijuana about 11:00; when they got there the women got out of the car on the main street and started to go into the different stores to shop; she imagined they shopped for about four or five hours; she was very tired. The men were not with them when they were shopping—she did not know where the men were; that the next time they saw the men was, they happened to see them on the street and they got in the car with them and they went for a ride and then they came back and the men dropped them again and they went back shopping. The second time, she imagined they shopped for about one hour and a half; she did not know exactly. The men had the car. The next time they saw the men was on the main street. She was in the store with the women when the men returned; they came out of the store and happened to see them there. The men were walking down the street looking for them. The car was parked down the street somewhere but she couldn't tell exactly. At that time she had a conversation with Frank Kramer. His wife was buying a hat

(Testimony of Katherine Wilson.)

and they left her in the store and walked down the street and he handed her a package. It was a can and he told her to carry it; she thought it was nothing; she took it and carried it. She put the can in her coat pocket. He also gave her [4] a little package along with it, she did not investigate, just stuck it in her pocket. The can was a Hershey Chocolate can and that was all she knew. There was no more conversation about the can, only when they went in to get stockings he asked her where she had it, and she said it was in her pocket and he said "You better put it away good." There was nobody else there when they went to get the stockings. When they were at the store with Mrs. Kramer, Mrs. Kramer told defendant Kramer to buy her, Katherine Wilson, some stockings. I said I did not have any money. And so he said: "Buy you some?" and he laughed and said "Well, you will have to work for it," and she said, "Work for it? you are crazy." So they went on to get the stockings. After she came out of the store she went into the rest room of the Long Bar and put the can in her brassiere; she imagined the size of the chocolate can was five or six inches, something like that. (Admitted as Ex. 1, chocolate can containing opium. Admitted as Ex. 2, small package containing hypodermic needles.) When they were in the store and he told her to put the can away he said that he would give it to Mrs. Kramer but she didn't have anywhere to carry it. She and Mr. Kramer were alone

(Testimony of Katherine Wilson.)

in the store when that conversation took place. When Mr. Kramer originally handed her the two packages she put them in her outside pocket; when she went into the rest room she put the can in her brassiere and the small package in her shirtwaist pocket; then she came out of the rest room and got in the car and sat down. Mr. and Mrs. Kramer were sitting in the front; Mrs. Irvin, defendant Wallace and she were in the back. They went to the Line and were stopped and asked some questions and told to pull over to the side. She did not remember if there was anything said about either of the two packages when they were driving to the Line. Mr. and Mrs. Kramer were sitting in the front, Mr. Wallace was sitting in the middle of the rear seat and she was on his left-hand side. When they got to the Line someone came up to them from the right-hand side of the car as it was facing toward the United States. Mr. Kramer was driving and Mrs. Kramer was seated at the right of her husband. [5] The officer asked Mr. and Mrs. Kramer whether they were citizens of the United States, and what they had brought across the Line, and where they were born. They said they were citizens. Mr. Kramer said he didn't bring anything across; Mrs. Kramer said she brought some handkerchiefs, some stockings, a hat and some slippers. She said nothing about the cost of them and showed them to the officers. Then the officer questioned them in the back seat and Mrs. Irvin said she brought

(Testimony of Katherine Wilson.)

some stockings and showed them to him. Then he asked Mr. Wallace what he bought, and she didn't think he had bought anything. Then he asked her what she had bought and said a pair of stockings and a pair of slippers and showed them to him. He asked her where she was born. The officer said the car had been seen in places where it shouldn't have been. He was standing on the left-hand side of the car at the front, and he said this car had been seen in places that it shouldn't have been seen, and told them to pull up over to the side and he got on the running board and Mr. Kramer drove the car up to the right of the road. He asked them to get out and come to the Customs House and she asked him should she bring her packages and he said no, leave them in the car, which she did, and they all went to the Customs House. Everybody was questioned separately. An officer questioned her and a white lady searched her and saw the can and the package in the course of the search.

Cross Examination

Katherine Wilson testified: that she was 41 years old and a single woman. She had lived with Mrs. Irvin for 23 years. When she came to California she came to her aunt and her aunt did not treat her right, and she went to live with Mrs. Irvin and had lived with her ever since. She came from Tacoma, Washington. Mrs. Irvin's husband died. During the time she lived with Mrs. Irvin, Mrs. Irvin served a term in the penitentiary at Cal-

(Testimony of Katherine Wilson.)

ifornia. She knew that Mrs. Irvin had used narcotics but Mrs. Irvin told her she wasn't going to [6] use it any more. She herself knew nothing about narcotics. She didn't know whether Mrs. Irvin used narcotics hypodermically or smoked them. She knew Mr. Wallace in Los Angeles before he moved to San Diego. When Wallace came to Los Angeles he stayed at his mother's house one night and then he stayed at their house and she was friendly with him. She understood that Mr. Wallace was trying to buy an automobile from Mr. Kramer, who was in the automobile business. She knew that a month or so before that they had had a transaction concerning another automobile, and she knew that some time before the 26th or 27th of April, Mr. Wallace had contacted Mr. Kramer and Mr. Kramer had a car to sell Mr. Wallace. She knew that Mr. Wallace and Mr. Kramer were going to attempt to try to finance that automobile in San Diego, and that was the reason she came to San Diego, she came down in the car. Mr. and Mrs. Wallace asked Mrs. Irvin and her to ride down and Mr. Kramer said he would bring them back. Mr. and Mrs. Kramer, Mr. and Mrs. Wallace and Mrs. Irvin and she came in this automobile to San Diego. On the way down she heard talk about buying the car. Nothing was said on the way down by anybody about going to Tijuana. They arrived about 2:00 or 3:00 in the morning on the same day they went to Tijuana. She had never lived in San Diego; she did housework in Los Angeles and Mrs. Irvin occasionally worked at

(Testimony of Katherine Wilson.)

housework—she went and served parties and things like that. She had been to Tijuana lots of times. She went with some friends that lived in San Diego about six or seven years ago. She had been to Tijuana with Mrs. Irvin about three times, they just went over to have a few drinks and look around, that was during the last two or three years, they shopped and bought little articles and souvenirs; they did not go across the line everytime they came to San Diego. She had never been across the Line alone. The only thing she knew about Tijuana was that they have some barrooms there and some stores. She did not know if Mrs. Irvin, when she was using narcotics, ever went across the Line to get any narcotics. She did not know where she got them. [7] She had never gone across the Line to Tijuana and got narcotics for Mrs. Irvin and brought them back to her or arranged for Mexicans to bring narcotics across the Line. She did not know anybody in Tijuana that dealt in narcotics. She did not know a Chinaman down there. She was arrested about 4:00 o'clock in the evening and along with Mrs. Kramer and Mrs. Irvin they were taken to the City Jail. She stayed there that night and all the next day and they transferred her over to the County. She did not know that on the second night that the matron in the jail where Mrs. Irvin was, had to give her an injection of narcotics because she was sick, because she wasn't there with her. Mrs. Kramer and Mrs. Irvin were together and she was

(Testimony of Katherine Wilson.)

off by herself. While she lived with Mrs. Irvin she knew nothing about narcotics, if Mrs. Irvin used it she didn't use it around her. She had never seen smoking opium and did not know that Tijuana had the reputation of smoking opium and had places where they smoked opium. She did not know anything at all about the reputation of Tijuana. She knew the men had gone to the bank in San Diego and also that Mrs. Kramer said she wanted to go to Tijuana to make some purchases and that all five of them got into the automobile to go to Tijuana in order to make some purchases. She had about \$3.00 or \$4.00 and some change when they left San Diego and she did not know how much Mrs. Irvin had. She did not know how much money Mrs. Kramer had. She changed her money at the Line, at the bank near the Line. She thought they all got out of the car and Mrs. Irvin changed her money and Mrs. Kramer did the same thing, but whether or not the men did, she did not know. Then they got back in the car and went across the Line. They went to the main street that has the stores on it and the Long Bar. She didn't know exactly what corner it was that the three women got out of the car but it was there on the main street. Then they went shopping and the men took the automobile and went somewhere, she didn't know where they went. During the shopping tour the three women stayed [8] together and went from store to store. She had no recollection of having gone anywhere else except in a store and some place to eat. During

(Testimony of Katherine Wilson.)

the time they were shopping she talked to a boy that she hadn't seen for a long time, a colored boy. She saw a Mexican down there, but she did not talk with him—he was with the men. She did not have any transaction with him. She had never seen the Mexican before in her life. The only person on the street who spoke to her was a colored boy. They shopped around for two or three hours the first time and during that time they had something to eat and Mr. Kramer and Mr. Wallace came back. When Kramer and Wallace came back there was a Mexican boy with them. *The* the five of them and the Mexican boy took a ride and went to the old race track and the Mexican boy had a house there. She did not go in the house. Mr. Wallace, Mr. Kramer, Mrs. Kramer and Mrs. Irvin went in the house. Then the six of them got in the automobile and came back to Tijuana. The three women got out of the car and the men, including the Mexican boy left in the car. Then they started out shopping some more, and during that time she did not see anybody outside of the merchants to talk to. She did not see Mrs. Kramer or Mrs. Irvin talk to anybody. They went in a drug store and Mrs. Kramer bought some makeup. While she was in the drug store she did not buy two hypodermic needles. (referring to Ex. 2). They came out of the drug store and did some more shopping and in a short time Mr. Wallace and Mr. Kramer met them on the main street. The men did not meet them on the street; Mrs. Irvin was

(Testimony of Katherine Wilson.)

standing on the street, because she was sick and left the store and had walked down to see whether she could see the car. She said that was where she was going and Mrs. Kramer was trying on some hats and she, Katherine Wilson, came out to see if she could see Mrs. Irvin and when she did, Mrs. Irvin and Mr. Kramer were walking down the street talking. Mrs. Irvin went and sat in the car because she was tired and Mr. Kramer came into the store to his wife. She had [9] the things she had been buying in her hand and Mrs. Kramer had her purchases in her hands, and Mrs. Irvin bought a pair of stockings and she had the packages in her hands. Mrs. Kramer had about three or four packages. Then Mr. Kramer and she went into a store to get some stockings and while they were walking down the street Mr. Kramer handed her a can, while they were going to the store. She had known Mr. Kramer in connection with buying the automobile and that was the only way. All she knew about Mr. Kramer was that he sold second-hand automobiles, and that was the extent of her acquaintanceship with him, and she knew he was trying to sell an automobile to Mr. Wallace. The can Mr. Kramer handed her was a Hershey cocoa can, and she did not think anything of it. When he handed her the can he said "Here, carry this." and she thought it was a cocoa can and she didn't pay attention to it, she just put it in her pocket—there was another little package on top and she just put it in her pocket; she didn't notice that it was a hypodermic

(Testimony of Katherine Wilson.)

needles, she had been drinking. Then they walked into a store where there were some stockings, but she didn't want any more stockings, his wife had asked him to buy her some. While his wife was there he said to her "Did you put that away?" And she took the tin of Hershey's cocoa, thinking it was Hershey's cocoa and put it in the inside of her dress, and she did not know what it was, and when she put the small package in her shirtwaist pocket, after taking it out of her coat pocket, she did not look at it and see that it was hypodermic needles, she noticed it was another package and was small and she put it there. On the way back from Tijuana she didn't believe there was any discussion about the purchases the women had made. They were stopped at the Line and the three women were taken in and searched. When they stripped her they found a can of Hershey's cocoa in her brassiere. It was not so heavy. She knew it was there but she did not know what it was. She did not think at the time when she brought it across the Line that she was [10] smuggling something or bringing something across the Line that she couldn't declare—she didn't even think about it. She did not tell the man at the Line that she had a bottle of Hershey's Cocoa in her brassiere. She didn't have any reason for not telling him—nobody had told her not to say she had a bottle of Hershey's cocoa or the small package. She didn't know why she didn't. Then she was interviewed by one of the narcotic agents and made a

(Testimony of Katherine Wilson.)

statement to him which he wrote down and she signed. He typed it himself there in her presence. He asked her questions and she answered those questions. She told the agent, in substance, that she had met a man in Tijuana by the name of Frank, a Mexican-looking fellow, who had given her the package and told her to bring it over to San Diego and give it to him at the bus line. She didn't remember what she told him about the hypodermic needles. Before taking her over to the county jail, the agent took her up to the bus station so she could identify for him this Frank, the Mexican man, and they stayed there for about half an hour. At the time she made those statements to the officer she was not telling the truth, but after they came back from the bus station she told the officer the truth—he wrote it down on the typewriter, the second statement. The first statement she made before she went to the bus station and swore to it was about the Mexican man named Frank, then when she came back from the bus station she told the officer, Mr. Linden, the first statement was not true; that she swore to a lie, but she had been drinking and was liable to say almost anything, but after she came back she told him the truth. That on the 29th she was arraigned before a United States Commissioner and her bond was fixed and she got out on bond. She was present at the hearing on May 4th at all times and hears Mr. Linden testify under oath that was the statement she made to him and at the conclusion of that hearing she was the only one

(Testimony of Katherine Wilson.)

that was held to await the action of the Grand Jury. The rest of them were discharged. She didn't know whether it was before or after that [11] hearing, she went in and had a conversation with Mr. Burch, United States District Attorney, and told him about Mr. Kramer giving her the package. She knew she was going to be indicted; she was arraigned after the indictment and the indictment was handed to her personally; she did not have an attorney the first time she came into court; then she employed Mr. Appel and Mr. Appel went down to San Diego with her and at that time she was fully aware of the fact that she was charged in Count 1 with importing a narcotic drug, and in Count 2 with transporting and facilitating the transporting of the same smoking opium within the United States and in Count 3 with entering into a conspiracy with Mr. Wallace and Mr. Kramer for the purpose of transporting opium and possessing opium in this country, and after consulting with her attorney and reading the indictment over herself she entered a plea of guilty as to the first two counts of this indictment, knowing the fact that if her possession was innocent that she was not guilty, but she knew that she had been the one who brought the package across. That after Mrs. Irvin was released and discharged from the preliminary examination, she and Mrs. Irvin went back to Los Angeles and continued to live together, but she did not know whether Mrs. Irvin used narcotics or not. Mrs. Irvin died on the 5th day of

(Testimony of Katherine Wilson.)

August in the General Hospital, Los Angeles. At the time they were in Tijuana she did not see Mrs. Irvin talking to a Chinaman named Louie, and Mrs. Irvin did not give her a package of opium after talking to the Chinaman. When Frank Kramer gave her the package and told her to put it away she did think something was wrong, and she knew one package contained hypodermic needles before she crossed the Line but she did not know what was in the can. She knew it was something he didn't want seen, didn't want declared. She knew Mr. Wallace was charged with having entered into a conspiracy with her and Frank Kramer to bring narcotics across the Line. She did not enter into any conspiracy or agreement of any kind or character with Frank Kramer to bring narcotics across the Line, nor with Mr. [12] Wallace, nor with Mrs. Irvin. She had been arrested before for narcotics, but never convicted, it was just because she happened to be present in the house where there were narcotics.

By Mr. Langford:

At the time she and Mrs. Kramer and Mrs. Irvin drove over to the old race track, they stopped in front of a house and remained in the car about 15 or 20 minutes—she sat in the car while the other five people went into the house; while she was sitting there she saw a truck with some water bottles on it and some other car drive up there in the immediate vicinity of that house, but she did not

(Testimony of Katherine Wilson.)

know who was in the other car, she did not pay much attention—the two cars just passed and turned around on the hill and went back down. The reason she did not go in the house was because she was tired and didn't feel good. There was nothing said by anybody on the way to the house except about taking the gentleman home. She did not see any package when the four people came out of the house and she did not hear any conversation about narcotics while they were in Tijuana or on the way to Tijuana from San Diego. She sat in the car outside of the bank when Mr. Kramer and Mr. Wallace went into the bank about the car transaction. There was a conversation in which it was stated by Mr. Kramer or Mr. Wallace that they hadn't been able to refinance the deal with the bank so that Mr. Wallace couldn't buy the car from Mr. Kramer.

Redirect Examination

The first time she saw this Mexican was after they had been walking around awhile, the Mexican was with the two men when they came back the first time. She was not introduced to him formally, they said, "This is Joe." She did not hear any conversation they had with the Mexican, she did not pay much attention to them. When they took a ride out to the old race track the Mexican was with them and they let him off at a house near the race track and then he came back with them [13] and the men let them off and the Mexican drove off with the men and that was the last she saw of him and when the men came back the Mexican was not with them.

(Testimony of Katherine Wilson.)

Cross Examination

Katherine Wilson testified: That after Mr. Kramer gave her the can he told her to put it away somewhere and she went into a washroom and took the can out of her pocket and put it in her brassiere. At the time she made the second statement to Mr. Linden, after returning from the bus station, wherein she stated Frank Kramer had given her the can, the following questions and answers were typed by Mr. Linden and signed by her:

Mr. Linden: "Your meeting this man Frank does not agree with the testimony given by other witnesses in this case. Do you wish to tell us just who gave you this package in Tijuana and what you were to do with it?"

A. Frank Kramer gave me the package.

Q. Who was present when he gave it to you?

A. He was standing outside the car and everybody else was in the car.

Q. They were.

Q. Never mind. Let me ask you these questions:

Q. Where in Tijuana did this take place?

A. On the main street near the Long Bar.

Q. Just what did Mr. Kramer say to you?

A. He said to put this in your dress and take it across. That is all. But he didn't offer me nothing to take it across.

Q. And did you put it in your dress at that time?

A. No, I stuck it in my pocket.

(Testimony of Katherine Wilson.)

Q. Was anybody but Frank Kramer in the car when you put the package in your pocket? [14]

A. I am pretty sure they were.

Q. When did you take it out of your pocket and put the package in your brassiere?

A. He and I were outside the car when he first gave it to me. I got in the car and we started down the street, we had just rode about half a block and then I put the package in my brassiere.

Q. Who else was in the back seat when you put the package in your brassiere?

A. Gertie, Mr. Wallace; Mrs. Kramer was sitting in front with her husband.

Q. Who knew that Kramer had given you this package?

A. I don't know whether anybody else knew he gave it to me. He never said nothing."

She did make a statement to Mr. Linden that while she was in the car that she took the package out of her pocket but she was so tired and worn out that she might have said most anything. She had been drinking. She knew who had given it to her but she didn't say it at first. She did tell him that Mr. Kramer gave it to her when they came back from the station. She did not read the statement before she signed it, as she was tired. Mr. Kramer gave it to her.

GEORGE BUNCASTLE,

called as a witness on behalf of the plaintiff, testified:

Direct Examination

He is a Customs Control Inspector; that on the 27th day of April, 1943, he followed an automobile in Tijuana; he observed a Ford Sedan having two men in the car—a white man driving, and a colored man as passenger in the vicinity of Fifth and Avenue Revolution about 11:30 or 12:00, noon. The car stopped on Fifth Street near Avenue Revolution, and the colored man got out and went into the side door of a saloon, and was gone probably two or three minutes and came out and got in the car and the car started up, and went down the main part of town, and parked in front of a combination billiard hall and pool hall and restaurant known as La Corona, where both got out the side and the colored man and the white man went inside, and the colored man stood [15] on the sidewalk, finally crossing the street, loitered a few minutes, and came back and got in the car and waited for the white man. They went to the end of the street at First and Avenue Revolution, cruising slowly to the south over the Avenue Negrita, between Fifth and Sixth, and stopped in front of a place known as Enrugui's, where the colored man got out again and went down the side of the building, and came back in a very short period of time, not to exceed five minutes, got back in the car, and the car cruised south on the same street; the car was under his observation

(Testimony of George Buncastle.)

probably an hour or so. The occupants of the car were later identified by him as Mr. Kramer and Mr. Wallace. He recognized them sitting in Court.

Cross Examination

George Buncastle testified: That on the 27th day of April he was operating in civilian clothes; that he observed a colored man and a white man in a Ford automobile driving around Tijuana—the white man was driving the automobile. They went to different places, mostly saloons and then they came back to Tijuana, and were headed for the main thoroughfare when he left them to return to the station at the Port of Entry.

ROBERT SCOTT,

called as a witness on behalf of the plaintiff, testified:

Direct Examination

That he is a Customs Patrol Inspector; that on the 27th day of April, 1943, he had occasion to follow an automobile in Tijuana—a Ford Sedan, license No. 60Z864. They were parking across the street from Caesar's Hotel on Avenue Revolution at shortly after 2:00 in the afternoon. At the time he first saw them there was a white man, a colored man and a colored woman, one person sitting in the front seat and one or two others in the back seat. Mr. Kramer and Mr. Wallace, the white man and the

(Testimony of Robert Scott.)

colored man, were standing on the left of the car, and Mrs. Irvin was getting into the car in the back seat; and very shortly the men got in and drove in toward the old [16] race track, going up in that direction. It was pretty hard to follow up in that district without being discovered so he returned to his station. Then later about 3:30, he went back again, and at that time he located the car across the street on Avenue Revolution in front of what is known as Tiopepi's Bar. At that time Mr. Wallace was sitting in the car and Mr. Kramer was on the corner talking to a Mexican. Not being able to get a place or position to see what transpired, he came back. He turned around to find a place, and then the car had disappeared, and then he returned to the Line, and waited until they came over. At approximately 4:30 the car came across the Line to the Port of Entry.

Cross Examination

Robert Scott testified: That on the 27th day of April, he followed a car containing a white man and a colored man and a couple of colored women headed in the direction of the old race track; that there was no place to hide as the road was pretty level so he returned to his station; then he came back later and saw Mr. Wallace in the car and Mr. Kramer on the street talking to a Mexican. Then he saw these people when they came across the Line. He saw in their car silk hosiery, cosmetics and things of that character.

J. T. MITCHELL,

called as a witness on behalf of the plaintiff, testified:

Direct Examination

That he is a Customs Guard and was stationed at the Port of San Ysidro on the 27th day of April, 1943; he observed a Ford automobile crossing the Line into the United States at about 4:00 p.m.; that the occupants of the car were Mr. and Mrs. Kramer, Mr. Wallace, Miss Wilson and Mrs. Irvin; he inspected this car and got the declarations; he asked Mr. Kramer what he had brought from Mexico and he declared nothing; Mrs. Kramer, who was sitting alongside her husband declared she had some hose, some cosmetics, and a pair of slippers; he then went to the rear seat of the car and asked the occupants there what they [17] had brought, and Mr. Wallace declared nothing, and then Mrs. Irvin declared a pair of hose and some slippers. Miss Wilson declared one pair of hose. He then asked all the people in the car if they had brought anything else from Mexico, and they all declared nothing else; and then he told the driver of the car to pull out of the line of inspection, and he got on the running board of the car while they pulled over; and the Control Inspectors took charge after that.

MISS MARY J. CLARK,

called as a witness on behalf of the plaintiff, testified:

Direct Examination

That she is the clerk and Acting Inspectress at the Port of San Ysidro and employed by the United States Customs; that on the 27th day of April, 1943, Katherine Wilson was brought in the Customs House to be searched, and that she personally searched her and found a can in her brassiere and two needles and a \$1.00 bill wrapped in a handkerchief in her skirt pocket. (Identified as Government's Exhibits 1 and 2.)

"Mr. Burch. I believe counsel for defendant Kramer has already stipulated that the can found on defendant Wilson contained seven ounces of smoking opium, and I believe that counsel for defendant Wilson is willing to so stipulate. Is that correct?"

Cross Examination

Mary J. Clark, testified: She was employed by the U. S. Government in the Customs Department at the Port of Entry between Tijuana and San Diego; that on the 27th day of April, three women, a white woman, Mrs. Rose Kramer, who sits in the Courtroom there, and the colored woman there, Katherine Wilson, who sits next to her attorney, and another woman, an older colored woman, Gertrude Irvin, were brought in to be searched; she and a female clerk searched them. Mrs. Kramer had on her prohibited currency about \$60.00 in cash money that

(Testimony of Mary J. Clark.)

was not changed into \$2.00 bills. Mrs. Irvin didn't have anything on her. She found in Katherine Wilson's shirtwaist two hypodermic needles; and in her brassiere a can marked Hershey's Cocoa; she did not open the can and did not know what the value of the opium was; she did not question Miss Wilson, just asked her where she got the can and Miss Wilson said a [18] man by the name of Frank had given it to her and she did not know him very well.

K. G. LINDEN,

called as a witness on behalf of the plaintiff, testified:

Direct Examination

He was the Customs Agent in charge of the San Diego Office on April 27th, 1943; that he had occasion to talk to the defendant Wallace in room 130 of the court building with Sergeant Grant of the Customs Control present. At that time he asked Mr. Wallace what connection he had, if any, with the seizure that had been made from the car in which he was a passenger, and if anybody had purchased narcotics in his presence in Tijuana. Wallace said no. He asked him if anyone had spoken to him about purchasing narcotics, and Wallace said no; he asked him if he had ever been involved in any narcotic arrest, and he said no. At that time Mr. Wallace was searched and in addition to some notes

(Testimony of K. G. Linden.)

and memoranda, there was found the sum of \$143.00 on his person, the large part of which was in \$2 bills. He asked Wallace what the purpose of the trip to Tijuana was, and he explained to him that he was trying to purchase a car from Mr. Kramer; that the negotiations for the purchase of the car had started in Los Angeles, and he found it necessary to come to San Diego to see if he could get the additional financing necessary to finance the car. Wallace stated that during the course of the day they had gone to Tijuana, both to try out the car, and to visit Tijuana. Wallace said he had spent in Tijuana possibly \$6 or \$7.00 in food or drinks, and he questioned him relative to his trips to Tijuana, at which time he was accompanied by Mr. Kramer—why he had gone to various places, one particularly, and he stated that Mr. Kramer had driven the car at all times, and that he had merely followed as a passenger. He did not request him to sign a statement. He had been an Agent since 1928 and in the course of his work he had had considerable dealings with the purchase of narcotics. The value of smoking opium fluctuates to some extent, depending upon the supply and demand. In Tijuana they had their seasons. The [19] value would range between \$10.00—possibly \$15.00 or \$18.00 an ounce, depending upon what connections you might have, and how much you wanted. Referring to the statement of Katherine Wilson taken before himself (Defendant's Ex. A); it was started at 7:05 on the evening of the 27th day of April.

(Testimony of K. G. Linden.)

Miss Wilson stated that this opium had been given to her by some man in Mexico whom she had known previously and that she was to bring it over and turn it over to him at the Santa Fe Bus Station about 8:00 p.m. that night; it was then about 20 minutes or a quarter of 8:00, so they sent their men, together with Miss Wilson, to the Santa Fe Bus Station in an attempt to check up this Mexican angle of her statement to see if that was true. And so the taking of the statement was held up until they returned, around 8:30. It was at that time that Miss Wilson changed her story from the original story about the Mexican. The point at which he broke the statement to go to the bus station is as follows:

“Your meeting this man Frank does not agree with the testimony given by other witnesses in this case. Do you want to tell us just who gave you this package at Tijuana, and just what you wanted to do with it?”

That was the first question he asked after they returned. He questioned the defendant Frank Kramer during the course of the investigation. Mr. Kramer was questioned first in view of the fact that he was operating the car at the time the opium was seized. He asked him what he knew about it and Kramer said, “Nothing, that no one purchased any opium in his presence; that the car belonged to a man named Cusack, a resident of Los Angeles, and that he had previously sold Mr. Cusack a car, and at the

(Testimony of K. G. Linden.)

request of Mr. Cusack he was trying to sell this car for Mr. Cusack; and that he knew Mr. Wallace, having previously sold him a car in Los Angeles, and that Mr. Wallace was interested in buying this car; and they were all in Los Angeles, [20] and they were to come to San Diego together to permit Mr. Wallace to go to a bank in San Diego in an attempt to finance the purchase of the car, and that the trip to Tijuana was merely incidental to the trip to San Diego." He did not recall that he asked Kramer to make a signed statement.

Cross Examination

K. G. Linden testified: That he was the Customs Agent in charge on the 27th day of April; he received notification that some people were being held at the Border because some opium and hypodermic needles had been found, and that those people were brought to his office about 5:00 or 5:30. Two men and three women were brought in to his office. The first person he interrogated was Frank Kramer, and Kramer said he did not know anything about it. Then he asked him about the automobile, how this particular Ford automobile got down from Los Angeles and then across the Line. At that particular time he did not investigate to ascertain whether Kramer's story of the car was true. The next person he questioned was Mrs. Irvin—he took a written statement from her. Mrs. Irvin stated that she had seen Katherine Wilson with the car in the car; she did not know where she had obtained it, and

(Testimony of K. G. Linden.)

she had heard no conversation about it. Then he called Miss Wilson in and took a written statement from her. Miss Wilson stated that she got this can from a man named Frank and she was to meet this man at the Santa Fe Bus Depot and deliver the can to him. Mrs. Kramer was never interviewed. Mr. Wallace was the last one to be questioned. He questioned Mrs. Irvin in the absence of Miss Wilson, and she intimated that Miss Wilson knew more about the can than she had said, and had not told the truth, and so when Miss Wilson came back and her story about the man named Frank had not materialized, he again continued questioning her. He did not again call Frank Kramer, but had some conversation with him on the way to the City Jail. Kramer asked him why he was being held, and he said he thought he had [21] sufficient to hold him for the United States Commissioner, and Mrs. Kramer also asked him why she was being held, and he told her the same thing. They held all five of them for the Commissioner's hearing which was held May 4th. After that hearing four defendants were turned loose, and only one defendant was held to the action of the Grand Jury. From the information he had smoking opium sells for about \$15.00 or \$20.00 an ounce. It depends on what the circumstances are, whether cash is being paid, how badly it is needed, and whether or not the buyer is going to take delivery, or where delivery is going to be made. They have had prices, some high, some low, by men who have actually bought it. A seven or

(Testimony of K. G. Linden.)

eight ounce can of opium might run from \$70.00 to \$200.00 for the can. As far as he understood Miss Wilson understood his questions when he interrogated her, and he was not under the impression that he was interrogating a woman who was so drunk or tired that she didn't know what she was talking about. He gave her the benefit of this investigation by asking an officer to see if there was such a man. To some extent he was a little prejudiced and did not have much faith in the fact of somebody having a tin can on the inside of her underwear and concealing it that way and not knowing what was in it. He asked her where it was that she took the package out of her coat pocket and put it in her brassiere and she said, in the automobile, and at the time she was not drunk. She was tired and he presumed wearied.

EDGAR WALLACE,

called as a witness, by and on behalf of the Defendant Kramer, testified:

Direct Examination

That he lived in San Diego and had lived there for about two and three quarters years. He was a professional window washer with a place of business in San Diego. Prior to April 27th, 1943, he knew Frank Kramer, who ran a garage and second-hand automobile business in [22] Los Angeles. And prior

(Testimony of Edgar Wallace.)

to that time he had contacted Kramer and asked him to get a car for him. He had previously tried to finance a transaction in San Diego with the bank. About the 26th day of April, he contacted Mr. Kramer in Los Angeles about a 1941 Ford Sedan and made arrangements with Kramer to come to San Diego and try to arrange for the financing of that car in San Diego. Gertrude Irvin, Katherine Wilson, Mr. and Mrs. Kramer and he and his wife came along in the car. Miss Wilson and Mrs. Irvin were friends of his. On the 27th day of April, he and Kramer went to the Bank of America in San Diego and talked to the manager of the bank, but they were not able to arrange the financing of the car at that time. Then they decided to make a trip to Tijuana. He went to the bank and changed for himself about \$150.00 into \$2.00 bills, about \$50.00 or \$60.00 into \$2.00 bills for Mrs. Irvin, and he got \$10.00 or 20.00 from Mr. Kramer or Miss Wilson or Mrs. Kramer—that was his best recollection; he got something over \$200.00 in \$2.00 bills. Then they got in the car and came to Tijuana. When they got to Tijuana the women got out of the car to do some shopping. He and Mr. Kramer proceeded to go around the town and drink and have something to eat and carouse around in general—wait on the women to finish their shopping, and went from place to place—he didn't know how much time was consumed, and came back there at that particular place—he didn't know what the name of the street was,

(Testimony of Edgar Wallace.)

and the women weren't in sight and they continued to go from place to place. He and Mr. Kramer were together throughout, with the exception of the time that he went across the street, or possibly Kramer went across the street, until they contacted the women. During that time they met a Mexican and used him as a guide, and rode around and wound up in the locality of the old race track. He knew the Mexican slightly. After they met the Mexican they ran across the women and they all went out to the old race track. Then they went to the Mexican's house; he didn't remember whether they all [23] went in the house or not. Then the six of them came back to Tijuana; the women got out of the car to do some more shopping, then they took the Mexican back to the place where they found him and Kramer bought the Mexican a drink. Then they left the Mexican and stayed around until they got ready to leave. Then they got the women, who had bought some stockings and slippers and things of that character and they came back across the Border and were stopped. During the time they were in Tijuana, neither he nor Kramer went in a drug store; they went in barrooms and houses. He did not see Kramer with a tin box or around one. He did not see him purchase any hypodermic needles. He did not see him in or around a drug store. Not at any time did he see the Hershey's tin box, with Kramer or anybody else—he never heard of it—the first time he heard about it was when they were arrested.

(Testimony of Edgar Wallace.)

Cross Examination

Edgar Wallace, testified: That the first stop they made in Tijuana was about in the third block on the main street on the right-hand side; he did not think they stopped before that. They stopped at the Border and he did not know who got out of the car; he did not get out of the car—it was possible some members of the party got out to change some money, but he couldn't say whether they did or not. When they stopped at Tijuana, the ladies got out of the car—they did not make any arrangements about where they were going to meet—they were out to do some shopping, and the assumption was that when they got through shopping, they would be in the same place they left them. There weren't any questions asked. He and Mr. Kramer went off in the car, just no place in particular, just around in general. He thought they had a drink in one of those places as soon as the women got out. He didn't know the names of the streets, it was on the highway. He was not particularly familiar with Tijuana—he had been over there lots of times, and he was able to go where [24] he wanted to go, but unable to direct anyone. He knew where the meat markets were, and the wholesale liquor store, and the race tracks, and things like that. They went with the Mexican over to the old race track—the Mexican had a house over there—they gave him something as a guide—there was no charge or anything. The reason they took the Mexican with them

(Testimony of Edgar Wallace.)

was they went looking for some girls—they engaged him to find some girls. He did not find them any girls because the women got in the car and they had to continue on with the women. The women just happened to see them when they were riding around. Then they went to the Mexican's house, he couldn't say as to who went in the house—he knew Mr. Kramer went in. The reason he went in the house was because he had a bad case of dysentery and walked out to the house on the premises. It was built on the ground with no doors, so he went right in and through the house down to the rest room. It wasn't a modern rest room, so consequently he was outside, and while he was outside, there was someone in the house, and he did not notice who, because it was of no importance to him. They did not sit around with the others in the house afterwards because there was no place to sit and there was nothing important to do there, they just visited a little. Then they came back to the main part of town and brought the Mexican with them. They let the women out of the car. Mr. Kramer bought the Mexican a drink and that was the end of the Mexican. They did not go to look for girls because the women were about ready to come into the car. Mrs. Kramer went to buy a hat, or something like that, so one would get in the car, and then look for the other, and finally they all got together and decided it was time to go. He heard the officers testimony in court and it was the truth. When they went into the different places, they went in to have a drink. Mr. Kramer

(Testimony of Edgar Wallace.)

was drinking with him at times. When he went in alone he possible went in for a drink. He did not know if opium was sold at any of the places he went in. When they were looking for girls they went to [25] the old race track. The reason they had the Mexican along was to find some women, but they didn't stop anywhere to look for girls, because the women of their party came along and they didn't want the women to know. He had been convicted of a felony at Spokane, Washington, in 1913—he went to a farm school. He was sentenced to Folsom in 1926, and in 1931 he was convicted of a felony, and in 1938 he was convicted of a felony.

Redirect Examination

By Mr. Cooper:

The felonies he was convicted of were thefts.

Recross Examination

He was convicted in 1938 of a violation of the Harrison Narcotic Act, and also convicted of selling morphine.

ROSE KRAMER,

called as a witness on behalf of defendant, Frank Kramer, testified:

Direct Examination

That she is the wife of Frank Kramer, and her husband is in the garage and second-hand automobile business; she is a receptionist employed at

(Testimony of Rose Kramer.)

Warner Bros., studio in Los Angeles. She knew that Mr. Kramer and Mr. Wallace were having some transactions concerning an automobile and were coming to San Diego and she came along with them. When they got down to San Diego she decided she wanted to go to Tijuana to do some shopping. Her husband gave her some \$2.00 bills after they got over the Line—she had about \$60.00 in a bank book in her purse. When they got to Tijuana the women started to do some shopping; Mr. Kramer and Mr. Wallace went away. They went from one store to another; sometimes the other women would go in a store with her and sometimes they stayed out. They shopped about three hours, maybe longer. While they were doing their shopping they saw the men and got in the car and rode with them. The Mexican was in the car with them and they rode over by the old race [26] track; she thought they all got out of the car but Miss Wilson. Then they came back to Tijuana, and they left the men and didn't see them again for some time. Sometime later in the afternoon they started back and at the Line they were stopped. While they were in Tijuana she and the two women went in a drug store on the corner on the main street, and while they were in the drug store Miss Wilson asked the Mexican druggist for some hypodermic needles. An American waited on her; she bought some Max Factor's Pancake Make-up and also a sponge to apply it. She saw Miss Wilson buy the needles and put the package in her purse. She saw Miss Wilson talk

(Testimony of Rose Kramer.)

to two colored men for quite some time, and later Mrs. Irvin talked to them. Later in the afternoon she saw Mrs. Irvin talk to a Chinaman. She had walked out of the store and was walking down the street, and Mrs. Irvin was coming toward her, and she heard her call, "Louie," and she turned around and saw her talk to this Chinaman—they stepped into an entrance, she thought it was a saloon. Later she was sitting in the front seat of the car, after the men had come back. Her husband, Mr. Kramer, was in the store and she thought Mr. Wallace was sitting in the back seat. Mrs. Irvin and Miss Wilson were standing on the street in front of the car—a little off, and she saw Mrs. Irvin hand Miss Wilson a package—a Hershey cocoa tin can. She thought Miss Wilson put the can in her coat pocket and that is the last she saw of the package until they were at the Border. She was there at the time Miss Wilson was searched. She did not see the tin can taken off her, but she was sitting outside when the clerk brought it out and gave it to the officer. At no time did she see her husband and Miss Wilson together alone.

Cross Examination

Rose Kramer, testified: That it was around 1:00 or 2:00 o'clock when she saw Miss Wilson buy the hypodermic needles from a Mexican pharmacist; she heard her ask for them and saw the druggist give [27] them to her. She did not think that Gertrude Irvin was an addict, she didn't think anything at all about it. She did not tell her husband

(Testimony of Rose Kramer.)

about Miss Wilson purchasing the needles; she knew Mrs. Irvin was not well and was taking some kind of shots. She saw Mrs. Irvin hand Miss Wilson the cocoa can just a short time before they came across the Border. She was not suspicious of what was in the cocoa can; she never thought anything about it. Mrs. Irvin had mentioned that she was going over to the market and buy some meat and coffee, so she did not pay any attention to it. She never thought anything about it when she saw Mrs. Irvin talk to the Chinaman; she was not suspicious **when** Miss Wilson talked to two colored men in a car—that was her own race. She did not watch her when she was talking to the colored man, she went to another street and up the street. In fact, most of the time the other women walked in back of her. She had no suspicions at all that there was anything wrong either from the purchase of the needles, or the conversation with the Chinaman, or the transaction involving the cocoa can—if she had been suspicious she would have said something about it and wouldn't have come across the Line with them. Miss Wilson or Mrs. Irvin were not friends of hers, she met them through her husband, through this car deal with Mr. Wallace. The two women were not friends of her husband's that she knew of. The only conversation she had with Mr. Linden was that she asked him not to take her to jail—that there was no one home to feed the chickens; she did not remember if Mr. Linden asked her if she

(Testimony of Rose Kramer.)

knew anything about the can of opium or the hypodermic needles.

Redirect Examination

By Mr. Cooper:

She was in jail with Mrs. Irvin and Mrs. Irvin got sick and the nurse had to give her a hypodermic injection.

FRANK KRAMER,

Defendant herein testified: [28]

Direct Examination

That he had been convicted of a felony—burglary in 1927 and that was the only felony he had been convicted of. During the years 1941, 1942 and 1943 he was in the garage and second-hand automobile business. He had a transaction with Edgar Wallace about three or four months ago—he secured an automobile for him and the deal didn't go through, and he had been looking for another automobile for him. He had the 1941 Ford for sale the day that Wallace came to town. Wallace asked him how much money it would take to handle it, and he told him that he thought he could handle it in Los Angeles for \$200.00, but he didn't know about San Diego, and Wallace said if he could handle it for \$200.00 he would buy it, and he went over and met him and came down to San Diego with him. He knew Miss Wilson and Mrs. Irvin before this automobile deal—he knew them through another automobile deal, not Wal-

(Testimony of Frank Kramer.)

lace's; he had known them seven or eight months. He came to San Diego with Wallace and went to the Bank of America, but Wallace was about \$75.00 or \$100.00 short of having enough money and they were not able to make that deal—Mr. Wallace had to get more money. Then they decided to go to Tijuana to do some shopping. He changed around \$50.00 or \$60.00 into \$2.00 bills and when he came back to the United States he had about \$30.00 or \$40.00. Mrs. Kramer spent most of the money—he may have spent around \$10.00. When they got to Tijuana they let the women off some place on the main boulevard to do some shopping and he did not want to go along and shop with them, so he and Wallace drove up a block or two and went to some barroom and they had a drink or two, and then, he thought, they went into two or three more and they met this Mexican—he knew him from over at the old race track, and the Mexican was going to take them down to some houses where there were some Spanish girls, so they put the Mexican in the automobile and they started down the main boulevard and ran into the three women of their party. The women asked them where they [29] were going, and they said they were going over to the old race track. They drove over to the Mexican's house by the race track and stopped. They were going to let the Mexican out there. When they got in there, there was no floor and it was all dirt, and the fleas were buzzing around so they only stayed there

(Testimony of Frank Kramer.)

a minute or two and got out. Then the Mexican decided he wanted to come back to Tijuana and they took him back, and at one of the cross streets there they let the women out, and they drove the Mexican to some place that he wanted a drink, so he took him into a barroom and bought him a drink, and left him there. Then they got in the car and started looking for the three women again, and he thought he saw Katherine Wilson and Mrs. Irvin, and he asked them where his wife was, and they told him she was up the street getting a hat, and he went looking for her and when he came back the other women were gone. Then they finally rounded up everybody, got into the car and went across the Border. When they got to the Border they were stopped and were told that they had been some place where narcotics were sold, and they would like to search the people in the automobile. During that day he was not with anybody else but Wallace and his wife. He did not have any conversation with Miss Wilson about concealing a can of opium. He did not go into a drug store with Wallace while he was down there. He did not purchase any hypodermic needles. He never purchased anything in the way of narcotics or anything else. He did not in any way assist, aid, advise or encourage Katherine Wilson or anybody else to bring any opium or narcotics, or needles across the Line. He did not in any way aid, assist or abet Katherine Wilson or anybody else in possessing, or transporting, or selling or buying any opium in this country over there.

(Testimony of Frank Kramer.)

He did not engage in a code, sign signal or any other way in any agreement with Katherine Wilson or Mr. Wallace or Mrs. Irvin or anybody else to bring any opium across the Line or to sell or conceal or transport any opium after it was brought over here. He did not have any conversation of any kind or [30] character with anybody in that party concerning opium or narcotics of any kind or character. He went in an automobile with these parties from Los Angeles to San Diego for the purpose of perfecting the sale of the car. He did not, on the 27th day of April, obtain \$240 in \$2 bills from the Fifth and Market Street Branch of the Bank of America. The transaction there was with Mr. Wallace. He knew nothing about Katherine Wilson concealing any narcotics until he was informed by the officer when he got over there and the first time he saw the can was yesterday. He didn't have any money to buy opium with and didn't buy it. He knew Mrs. Irvin got some money, but he didn't know whether it was \$50 or \$200.

Cross Examination

Frank Kramer testified: He heard his wife testify on the stand and heard her say Katherine Wilson went into a drug store and purchased some hypodermic needles. He heard her say that Gertrude Irvin handed Katherine Wilson a cocoa can on the main street of Tijuana; also that Gertrude Irvin went into a saloon with a Chinaman. The first time he heard his wife tell this was the day they

(Testimony of Frank Kramer.)

got arrested—right along about that time. He believed she told that story at the preliminary hearing. He didn't get to talk to his wife before they were taken to the County Jail—they were separated. She did not tell him anything about it at Tijuana. He did not know or suspect that Gertrude Irvin was a narcotic addict when they went to Tijuana—he did not know them well enough then. He heard the officers testify about him and Wallace riding around to the various saloons, and to a certain extent their testimony was correct—they drove around there—he didn't know one street from another; he had been in Tijuana before, but there had been long periods between. He had been convicted of one felony—burglary in 1927. He got one year at Terminal Island for impersonating a Federal Officer. The story his wife had told that morning about the purchase of the hypodermic needles she had first told him about the time of the preliminary hearing or after it. She first told him about the cocoa can after they were arrested sometime. She never told it to the officers. The first stop they made as he remembers it on the way to Tijuana was [31] at the Border. He didn't know whether he changed any money at the Border or not. They all spent the night of the 26th of April at the home of Mr. and Mrs. Wallace and the next morning made the trip to the Bank, and then the whole party, except Mrs. Wallace, went over to Tijuana.

REBUTTAL

Direct Examination

K. G. LINDEN,

testified: He had a conversation with Mrs. Kramer on the evening of the 27th day of April in the car driving from the building to the County Jail; he was driving and Mrs. Kramer was seated in the rear of the car with Mr. Kramer and one of the colored women and Mrs. Kramer stated that she knew nothing about the narcotic, the can of opium, and the hypodermic needles.

Testimony closed:

Thereupon the cause was argued by counsel for both plaintiff and Defendant.

The Court: I want to call counsel's attention to the Federal Law, Section 541, which is as I indicated, and not as understood by counsel for the defendant.

“Felonies and Misdemeanors”

“All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors.” It is not what is done but what may be done that determines a felony. The only reason I didn't permit the asking of the question is that I didn't know exactly the section, and no proof was made of exactly the section under which the criminal prosecution took place. I didn't want to pursue the matter but I just want to indi-

cate the correctness of my understanding of the law in the Federal Court.

Now, if I had had knowledge what situation would develop here I think I would have preferred to have the matter determined by a jury [32] of 12 men, whose judgment I would prefer always. However, I can't avoid my responsibility. The trial by jury was waived by the Government and the defendants, and I have to determine the matter as best I can.

Now, there is an absolute conflict here in the evidence on some very definite points, and as I say, whether I like it or not, I have to believe one side or the other. Now, I must be perfectly frank. I didn't believe Mrs. Kramer. I don't believe that she took the stand and told the truth, if I have to judge it from my knowledge of human reactions. In the first place she told the officer that she didn't know anything about this opium or these narcotics, or this can, or these hypodermic needles—that she didn't know anything about it at all. Well, if she did not know anything about it, the officer wasn't required to put her through a third degree to get her to tell what she did know. But she is nobody's fool. She is married to a man with a criminal record, which I don't know whether she knew or not, but I presume she did. She wasn't born yesterday, and from her associations I am satisfied that she must have known that it is dangerous for anyone to monkey around with narcotics in this country. Not only is it a terrible crime, and severely penalized, but morally it is a

terrible thing, and she undoubtedly knew it. Everybody knows what the effect of narcotics is. She knew that her husband was traveling around in an automobile. She knew that they had brought some colored people down in Tijuana. Whether she knew that two of them were or had been narcotic addicts doesn't develop. I don't think it makes very much difference. It is rather hard for me to believe that she rode down there with these three colored people just as a pleasure trip—it is very hard for me to believe that statement. It is very hard for me to believe that knowing that she did, she would see one of the women passengers talking with a Chinaman, going into a side entrance, or into a saloon with him, or talking with some colored [33] men, having a can and going across the Border and not declaring it, even though she thought it was just exactly what it purported to be—chocolate. I don't believe it would be natural for her, knowing the danger of having any contraband in the car, to have gone across the Border and said nothing, when there was no declaration of any chocolate, or any narcotics, or anything else.

Now, naturally, she wants to save her husband's skin. I did not believe Mr. Kramer, either, to be perfectly frank. It is human to want to save yourself, naturally, from severe punishment. And I think he told the best story he could, but it didn't convince me, and I don't believe it would have convinced the jury, if we had been fortunate enough to have a jury here. I don't believe that Kramer came down here on any social visit, or

went down to Tijuana with these three colored people on any social visit, or on any such innocent expedition as he contends. Nor do I think the profit on this car, on a car of that size, would be sufficient to justify the things which he frankly admits. I believe that he, and perhaps, he and Wallace—I don't know anything about that—I said yesterday that Wallace might be just as guilty as guilty could be, but that was none of my business. It was simply my business to decide the matter from the evidence, and there wasn't any evidence on which I felt justified in holding Wallace. I am sorry to say that I wasn't very much impressed with Wallace's testimony but he has been in a bad way before. I don't know anything about it; he may be a narcotic addict himself right at the present time, but that wasn't what he was here for; but I don't believe he told the truth about the trip. He may be so dumb that he thought that they were going around on the story as told, to get ahold of some women. Well, there isn't a man here that hasn't been down to Tijuana a good many times, and you don't have to hire a guide to find a prostitute in Tijuana, and you all know that; and I don't believe that they hired any guide to find a Mexican prostitute. I think [34] that they were looking—Kramer was looking for a method of getting some opium, and I believe he got it—either he or Wallace. And I believe the story of this Wilson woman. I think it is a perfectly natural thing for that colored woman to say, "A Mexican handed it to me and asked me to bring it across the Line."

She had to have some explanation and I don't have any doubt that her first instinct was to lie about it. But I believe she came through with the truth when she said that Kramer handed it to her. I don't know who it was for; maybe it was for Mrs. Irvin and Wallace; maybe it was for commercial purposes, but I have to believe someone, and I am frank to say I did believe the Wilson woman. I believe her story ranks much truer than the stories of either of the Kramers or Wallace, insofar as he told it, but it may be that Wallace was just dumb enough to think that they were running around Tijuana as the officers Buncastle and Scott indicated, going from one door to another and into side entrances. Now, when a person wants to get a drink he doesn't sneak into side entrances to get a drink, he goes in the front door and orders what he wants. There is no law against anyone taking a drink. Nor do I believe that if a fellow wants to get a woman and he has hired a guide for that purpose, that he would take the guide and go right back on the main street of town. That just doesn't happen. If a fellow is going to slip one over on his wife he goes down the back street, and when he gets through he comes back and keeps his mouth shut.

Nor do I think the story held water—they got rid of the women; if that is what they were after they would have gone down and got it after they got rid of the women the second time. I don't know where they got this opium, but I am satisfied that

Kramer got it somewhere, and I am satisfied that he gave it to Wilson, and I am satisfied that Wilson brought it across, and I am satisfied that Wilson, when she brought it across, knew what it was; and I am satisfied that Wilson knew what she had when she brought it across. [35] Now, Mrs. Kramer is not being prosecuted here, and I have released Wallace. I, frankly, from the evidence believe that that was the entire object of the trip. I don't know who was to get the opium, or who was to pay for it, or what. I don't believe that Kramer was doing it for nothing; I believe that he did enter into a conspiracy with Katherine Wilson to bring that opium across here. I find the Defendant Kramer guilty on the first count, on the second count and on the third count. He is remanded to the custody of the United States Marshal.

The Court: Mrs. Kramer, will you come forward. please? If I let your husband go on his own recognizance between now and Monday morning at 9:00——

Mr. Cooper: May I say a word about that, your Honor? I am to be in a Justice Court for sentence in Gardenia at 9:00 o'clock,

The Court: Tuesday morning at 10 minutes to 10:00

Mr. Cooper: All right, sir.

The Court: Will you stay with him constantly, and never let him out of your sight, if I let him go until that time? Mrs. Kramer: Yes.

The Court: Do you so promise?

Mrs. Kramer: I will.

The Court: Then, I don't want him to come into San Diego County, I don't want him to go anywhere near the Mexican border line, within 100 miles of the Mexican border line, I don't want him to have contact with any narcotic men, or men who have any dealings with narcotics, or addicts, between the time I release him here today, and the time that he comes in court for sentence. I may not be doing right, but I feel that under the circumstances, he should possibly be given an opportunity to prepare himself for the serving of a sentence, and to arrange his business. I am not going to refer the matter to the Probation Department, as I have indicated to you—that is contrary to my practice in those cases. And if Mr. Cooper [36] and Mr. Shreve will see that he gets out of town within the next two hours, and he doesn't come back, I will feel very much better about it.

Mr. Cooper: Would your Honor then sentence Miss Wilson at the same time?

The Court: No, I haven't any connection with the case so far as Miss Wilson is concerned. It was put on a week from Monday, for what reason, I don't know. I would have just as soon have sentenced her at the same time.

Mr. Cooper: I think I can arrange to change that, by Mr. Appel.

The Court: If she comes in voluntarily at 10 minutes to 10:00 on Tuesday and asks to be sentenced, I will sentence her then. I will be very glad to take care of the whole matter at one time.

Mr. Cooper: That was referred to the Probation Office—that was referred.

The Court: Only for presentence report. I wanted to get her record.

Mr. Cooper: I understand that the Probation Office made a favorable report, and I understand your Honor says that he doesn't give probation.

The Court: It has been my practice, however, that doesn't interfere with my taking into consideration what the Probation Officer has to say.

The Court: You have the conditions under which he is released on his own recognizance, and with his consent, then, and the consent of his counsel, the matter of sentence will come up at 10 minutes to 10:00 next Tuesday morning in my courtroom in the Federal Building in Los Angeles.

Mr. Cooper: You understand that thoroughly?

The Defendant: I understand to be there Tuesday morning at 10:00 o'clock.

Mr. Cooper: 10 minutes to 10:00 next Tuesday morning.

And thereafter on the 11th day of October, 1943, and within the time [37] required by law, the defendant served his notice of intention to move for a new trial, in the following form, to-wit:

In the United States District Court, In and For the
Southern District of California, Southern
Division.

No. 6776-Cr.

UNITED STATES OF AMERICA, Plaintiff,

vs.

KATHERINE WILSON, FRANK KRAMER,
and EDGAR WALLACE, Defendants.

MOTION TO VACATE AND SET ASIDE VER-
DICT OR DECISION AND GRANT A NEW
TRIAL.

Comes now the Defendant Frank Kramer, in the
above entitled action, and moves the Court to vacate
and set aside the verdict and decision heretofore
rendered in this action and grant him a new trial
upon the following grounds, to-wit:

I.

That the verdict and decision is contrary to the
law.

II.

That the verdict and decision is contrary to the
evidence.

III.

That the verdict and decision is contrary to the
law and the evidence.

IV.

Errors of law occurring during the trial of the case, and duly excepted to by the Defendant Kramer.

V.

Said motion to be made upon the records and files of this action together with the phonographic record taken at the time of trial.

.....

John S. Cooper,

Attorney for Defendant,

Frank Kramer.

.....

George H. Shreve,

Attorney for Defendant,

Frank Kramer.

Dated: October 11th, 1943. [38]

[Title of District Court and Cause.]

AMENDMENT TO MOTION TO VACATE AND
SET ASIDE VERDICT OR DECISION
AND GRANT A NEW TRIAL

Comes now the defendant, Frank Kramer, by leave of the trial Judge, the Honorable Ralph E. Jenney, first had and obtained, and files this, his amendment to his motion heretofore made to vacate and set aside verdict or decision and grant a new trial; and particularly specifying wherein the verdict and decision is contrary to the law and contrary to the evidence, states:

Count I.

Count I specifically charges Katherine Wilson, Frank Kramer and Edgar Wallace did on or about the 27th day of April, 1943, "then and there knowingly, wilfully, unlawfully, feloniously and fraudulently import and bring into the United States certain narcotics in violation of 21 U.S.C. 174.

This section is a companion section of section 173 to 178 of the same Code and is the penalty section. The section itself reads: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory thereof contrary to law or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought, etc."

Under the decision of *Palermo vs. United States*, 112 Fed (2) 522; this section which provides the penalty for the acts forbidden [39] by section 173, is a specific section not related to other custom laws and absolutely forbids the importation of smoking opium and provides separate offenses for every act done in connection therewith and under the law, the importation takes place as soon as the international line is crossed.

Under the evidence of the Government in this case, the facts showed that Katherine Wilson with the other defendants, was stopped at the International line by customs officers; that after some members of the party had made some declarations of goods that they purchased in Mexico, the cus-

tom officers took all the five parties into the custom house where they were searched, and there the can of opium together with two hypodermic needles was found upon the person of Katherine Wilson.

The defendant Kramer drove the automobile Katherine Wilson was riding in and Katherine Wilson testified that Kramer had given her the opium and the narcotic needles in Tijuana. As the importation takes place the minute the narcotics cross the boundary line, certainly Frank Kramer did not import the narcotics. He was not specifically charged with "assisting" in so doing, as he could have been, so therefore as a matter of law, he was not specifically guilty of the offense charged in Count I.

Count II.

In this count, Kramer is charged together with Katherine Wilson and Edgar Wallace as follows: "that they did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain preparation of opium***as said defendants then and there well knew had been imported into the United States of America contrary to law."

Under the evidence of the Government in this case, the evidence shows that Katherine Wilson had the opium concealed upon her person and that as soon as they were stopped at the Line she [40] was searched and the opium was taken from her person.

Under the law, some act must be done by the

defendants or some of them, other than the act of importation, as this provision of 174 is separate and distinct from the importation and provides for an act done after importation. The authorities for this point are:

Pong Wing Quong vs. U.S., 111 Fed (2) 751;

Palermo vs. U.S., 112 Fed (2) 922;

Krench vs. U.S., 42 Fed (2) 354;

Kurczak vs. U.S., 14 Fed (2) 109.

In each of these cases the narcotics or liquor had already crossed the International Line, and after they crossed the Line, the defendants in each case did some act to conceal or facilitate the transportation of or otherwise the prohibited article. The best case being the case from the 9th Circuit;—Pong Wing Quong vs. U.S. 111 Fed (2) 751.

In that case, after the drugs were in the customs house, the defendant placed a false custom sticker on the trunk so that the trunk could pass the custom officials inspection. So, therefore, as a matter of law as to this count, the defendant is not guilty as a matter of law, because he did not do any act to aid, assist or abet in the concealment or transportation of said prohibited drugs.

Count III.

This count charges a conspiracy of the three defendants to do the act set forth in counts I and II.

If the Government's evidence is to be believed regardless of the denials of the defendants, of necessity in order to convict the defendants of the con-

spiracy "that although it is proper for Congress to create separate and distinct offenses growing out of the same transaction where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of former is a bar to prosecution for latter." Therefore, [41] the conviction of the conspiracy and the substantive offenses in this case are inconsistent and cannot stand.

The defendant also states that since this decision of the Court in this action that he has discovered evidence which he did not know and could not have discovered by reasonable diligence beforehand. This evidence is set forth in the affidavit of Frank Kramer hereto attached, marked Exhibit A, incorporated in and made a part of this motion. And, as set forth therein, and as clearly shown during the trial of this case, the defendant from the hearing before the Commissioner was led to believe that Katherine Wilson would testify that a Mexican had given her the can of opium and that the defendant knew nothing about it, and that in so far as the hypodermic needles are concerned, the only information that he had was the information that he had received from his wife; that she had seen Katherine Wilson buy the same. That after Mrs. Kramer had testified and the Court made a statement in substance and effect that he did not give credence to Mrs. Kramer's testimony, and that if Mrs. Kramer had known these things she should have told her husband before the car crossed the Line; That Mrs. Kramer became very much hurt

and decided to try, if possible, to get evidence to substantiate her story. She went to Tijuana to see the druggist in the drug store there; that while in the drug store at Tijuana on the 9th day of October, according to her statement, she saw the druggist who waited upon her, but did not see the druggist who waited upon Katherine Wilson; that the druggist who waited upon her told her that he recognized her as having been in his store, but that he had no recollection of any transaction concerning hypodermic needles, and that under the law of Mexico, that no record was kept of the sales of such articles; that a child could buy them, and therefore, there was no record in the store of this transaction. Frank Kramer then requested Horace Appel, the attorney for Katherine Wilson to bring Katherine Wilson to Horace [42] Appel's office so that Frank Kramer could talk to her, and what took place at this interview, among other things, is what is set forth in the affidavit of Frank Kramer.

As to whether or not this testimony is newly discovered is certainly a debatable question as a matter of law, but the fact remains that if Katherine Wilson did admit after the trial that she purchased the hypodermic needles, as testified to by Mrs. Kramer, Katherine Wilson, being an accomplice and her testimony being subject to close scrutiny, certainly this would be very strong testimony to discredit all the rest of her testimony in view of the fact that she stated that Frank Kramer gave her both the can of opium and the narcotic needles, and the can of opium was found concealed

under her clothes, and the narcotic needles were found in the pocket of her shirt waist.

Dated: October 13th, 1943.

Respectfully submitted,

JOHN S. COOPER,

Attorney for Defendant,

Frank Kramer.

GEORGE H. SHREVE,

Attorney for Defendant,

Frank Kramer. [43]

EXHIBIT "A"

[Title of District Court and Cause.]

No. 6776-Cr.

AFFIDAVIT

State of California

County of Los Angeles—ss.

Frank Kramer being duly sworn deposes and says: That he is the defendant in the above entitled action; that his testimony now if sworn would be the same as his testimony sworn to on the trial of this action; That after the case was decided by the Court and the Court made the statements that it did concerning the testimony of Mrs. Kramer, that Mrs. Kramer felt very much hurt that the Court did not believe her statement, and told defendant that she was going to Tijuana to see if she could find the druggist who sold Katherine Wilson the needles; that upon her return she informed defendant that the druggist who waited on

Katherine Wilson was not in the store, but that the druggist who waited on her was, and the druggist told her that he remembered her but he did not remember any transaction whereby the hypodermic needles were sold, and that there would be no way of finding this out from the records of the drug store as the law of Mexico did not require records to be kept of such transactions, and that a child could buy hypodermic needles in Mexico. As the defendant had such confidence in his wife, and knowing the attorney for Katherine Wilson, he requested Horace Appel, the attorney for Katherine Wilson, to have Katherine Wilson in his office, in order that the defendant might talk to Katherine Wilson in the presence of her attorney. At this interview, which took [44] place on the 11th day of October, among other things the following took place:

“I, Frank Kramer went to the office of Horace Appel; he, Horace Appel had Katherine Wilson come to his office. Horace Appel said to Katherine Wilson: “Frank here says you did not tell the truth. I don’t want to have anything to do with sending an innocent man to jail.” I, Frank Kramer, then asked Katherine Wilson why she said I gave her the can and needles; that she knew Gertie Iryin gave her the can and that she herself bought the needles; that the druggist that sold them to her could testify. She, Katherine Wilson said: “Yes, I bought the needles but you gave me

the can." I said: "You know that Gertie Irvin gave you that can, not me." and she said "Gertie Irvin gave you that can and you gave it to me."

Affiant says that he could not with reasonable diligence have produced this testimony at the time of trial.

FRANK KRAMER

Subscribed and sworn to before me this 13th day of October, 1943.

EARL F. CRANDELL

Notary Public in and for said County and State.
[45]

Thereafter on October 16th, 1943, and within the time allowed by law the following proceedings were had upon a motion for a new trial, judgment and sentence:

San Diego, California,
Monday, October 18, 1943
11:45 A. M.

The Clerk: No. 6776, United States vs. Katherine Wilson and Frank Kramer. Motion for a new trial as to Defendant Kramer. Sentence as to Defendant Wilson.

Mr. Cooper: The defendant is here and desires to proceed.

The Court: I have gone over your petition for a new trial very carefully, and I am prepared to rule, unless you have something further which you

have not called the Court's attention to, but to which you would like to call the Court's attention.

Mr. Cooper: I could elaborate on the subject, if you please, as far as that is concerned; just certain phases of the evidence, that would be the extent of it. So far as the authorities are concerned, after again reviewing the authorities, I find no additional authorities that lay down any stronger position than the authorities I cited to your Honor, but I do find in some other cases some reasoning that would verify those authorities, sir.

The Court: I recognize that there are quite a number of authorities. Now, as I understand it, let's eliminate the questions of law and discuss the questions of fact. The testimony, at the time of the trial, given by the Defendant Katherine Wilson was that she received certain hypodermic needles and a can of opium from the Defendant Kramer, and was told to put them away and put them away good. The indications in the affidavit of Mr. Kramer, and the indications in the testimony of Mrs. Kramer at the time of the trial were that the Defendant Katherine Wilson actually bought the needles in a drug store in Tijuana, and that Mrs. Kramer saw her buy them. At the time of the trial, the Defendant Katherine Wilson said that they were [46] handed to her by the Defendant Kramer. There was no attempt, on cross examination, at the time, nor did I think of it at the time, to bring out whether or not she had possibly bought the needles, handed them to Mrs. Irvin, and Mrs. Irvin had given them to Kramer, and Kra-

mer had handed them back to her with the can of opium. That I don't know. But, as I understand it, from the affidavit, the Defendant Katherine Wilson now admits that she did buy those needles in the drug store. Is that correct?

Mr. Cooper: That is the affidavit of Mr. Kramer, if your Honor please. The statement was made in the presence of Katherine Wilson and Katherine Wilson's attorney, Mr. Horace Appel.

The Court: Now, would the Defendant Wilson be willing to be sworn and testify as to that one point? Just come forward and be sworn, please.

Mr. Carter: I might say, if the Court please, I expected the matter of Katherine Wilson to be on the calendar at 10:00, and I planned to take an affidavit from her.

The Court: I recognize the fact that we had some confusion about that. After all, I wanted to treat this whole thing together, and I think it was as much my fault as anyone.

Mr. Appel: I called this morning to ascertain whether it was 10:00 or 11:45.

The Court: I think there was a little confusion.

Mr. Appel: I understood it was 11:45, however.

KATHERINE WILSON

called as a witness, being first duly sworn, was examined and testified as follows:

The Clerk: State your full true name.

The Witness: My name is Katherine Wilson.

Examination

By the Court:

Q. You understand, Miss Wilson, that you don't have to [47] testify here at all. I want to take your testimony, however, in connection with this motion for a new trial. I also want to take your testimony here in connection with any possible application, past or future application, for probation. One point that I want to be satisfied on is this: At the time of the trial you testified that you received together, from the Defendant Kramer, a can, and on the side of it, or with it, was a little package, very small package, an inch and a half or less than an inch and a half square, containing some hypodermic needles; that you just put those in your pocket together? A. Yes, sir, I did.

Q. Now, in this affidavit of Mr. Kramer he says that you told him, in the presence of your attorney, that you had bought those hypodermic needles at a drug store in Tijuana. Is that correct?

A. No, I didn't tell him that. He kept after me and kept saying, "You bought those needles." And I said, "Yes, I bought them." But just to make him leave me alone. He just kept after me, and he came out to my house on Saturday night,

(Testimony of Katherine Wilson.)

he and his wife, and they both tried to make me say Gertie give me the can. He said, "You can come and live with me." And I said, "No, I am not going to do that, because what I tell is the truth. I am not going to perjure myself for you."

Q. Your testimony at the time of the trial is correct? A. Absolutely.

The Court: You may cross examine.

Cross Examination

By Mr. Cooper:

Q. You say now that in the presence of your attorney, Frank Kramer, the defendant, your co-defendant, said to you, in substance and effect, "You know that you bought those hypodermic needles, and you know the druggist you bought them from," or words [48] to that effect. Then you said to him, "Well, I bought the needles." Is that right?

A. Yes, I said that, because he kept after me.

Q. That is what you stated to him?

A. That is what I said to him. But I never signed no papers, or nothing, that I bought them.

Q. Now you are referring to a Saturday?

A. Yes.

Q. That Saturday night or Sunday, whatever the day was that you refer to, was before you were called as a witness in San Diego?

A. No, it wasn't. I was supposed to be there, and they told me, "There is no need of you going down there on the 6th, because you are guilty, you plead guilty."

(Testimony of Katherine Wilson.)

Q. I am speaking about before you testified. That was before you testified in San Diego?

A. Yes, it was.

Q. All right.

The Court: Now, let me see. I don't know if I understand it. You mean at this time that you told Mr. Kramer, in the presence of Mr. Appel—

Mr. Cooper: No.

The Witness: No.

Mr. Cooper: That conversation was just last Monday.

The Court: Since the trial?

Mr. Cooper: The conversation she is referring to wherein there was a conversation about Gertie handing the can to Frank Kramer and Frank Kramer handing the can to her—I am asking her if such a conversation wasn't had before you went to San Diego and testified as a witness?

The Witness: Yes, it was the Saturday before I went there.

Q. By Mr. Cooper: All right. Now——

A. Why would they want me to come and live with them if he [49] wasn't guilty?

The Court: Never mind about that.

The Witness: I don't understand it.

Q. (By Mr. Cooper): Now, in that conversation which was before you went to San Diego and testified as a witness, did you say to Mr. and Mrs. Kramer, in substance or effect, that Gertie gave the can to Frank Kramer, and Frank Kramer gave the can to you? A. No, I didn't.

(Testimony of Katherine Wilson.)

Q. All right. Now, when you were talking in Mr. Appel's office, after the trial in San Diego, that is, last Monday, when you were talking in Mr. Appel's office on that day, at that time Mr. Frank Kramer said to you, in substance or effect, that you had told him and his wife that Gertie gave the can to Frank Krmaer, and Frank Kramer gave the can to you? A. No, I didn't.

Q. Well, didn't Frank Kramer say that to you?

A. He said that to me, but I didn't say it to him.

Q. Did you deny or affirm that fact when he said it?

A. I said, "You know you gave me the can."

Q. I see.

Mr. Cooper: That is all that I have to ask the witness.

The Court: I have no further questions.

Mr. Appel: That is all.

Mr. Carter: There are other facts which could be elicited as to the Defendant Kramer's attitude towards this witness, subsequent to the verdict. But I don't think it would add anything to what is in the record.

Mr. Cooper: As far as that is concerned, Mr. Carter, I am perfectly willing to admit that. The question is Mr. Appel and Mr. Kramer can both state the fact that——

The Court: I don't care to go into that. So far as I am concerned, I just wanted that one point cleared up. It is perfectly [50] natural for a man

(Testimony of Katherine Wilson.)

to go after anybody after he has been convicted. That is just human. And I don't want to go into that.

Mr. Cooper: I was going to say the conversation was had in the presence of her own attorney. So, if there is anything improper about that, I can't conceive it.

Mr. Carter: I was referring to other conversations. But I don't think it would add anything.

Mr. Cooper: What I have to say about that——

The Court: You may step down.

(Witness excused.)

(Further argument on the motion reported but not transcribed.)

The Court: Well, I don't think I care to hear any reply by the Government. I have been over this so many times. I disagree with your interpretation of the law. The motion for a new trial, the motion to set aside the verdict, and the motion to vacate are all denied.

Mr. Cooper: If your Honor please, I respectfully desire to note an exception to your Honor's ruling.

The Court: Yes, surely.

Mr. Cooper: Didn't your Honor, at the time that I moved for a directed verdict, grant me an exception upon that motion there? Does your Honor remember?

The Court: I think so.

Mr. Cooper: If you didn't, would it be allowed?

You know, that is the only exception I could take, don't you?

The Court: Yes. If you didn't ask for it——

Mr. Cooper: It would raise the same point, I believe.

The Court: If I can do it, I would be willing to do it now. I don't know that I can. My memory of it is that you took an exception and that I allowed the exception. That is my recollection of the record.

Mr. Cooper: My recollection is that you stopped me and you [51] stated, "You can have your exception."

The Court: Well, I am very, very careful about that. If a man doesn't take an exception both at the close of the Government's case, and, again, at the time of the close of his own case, I invariably remind him of it and give him an exception. It has happened in this courtroom dozens of times. I think you protected your record on that in the record.

Mr. Cooper: I know, as far as the trial is concerned, that is the only exception on earth I could have had, because as far as the rulings on the evidence are concerned, your Honor ruled in my favor throughout, and I couldn't except to rulings in my favor.

The Court: Well, I think there were one or two exceptions, and I think they were allowed.

Mr. Cooper: All right, your Honor. Thank you.

The Court: The Defendant Kramer will come forward for sentence. It is the sentence of the

Court that on Count 1 of the indictment you serve a term of two years in an institution of the penitentiary type to be chosen by the Attorney General of the United States.

The Defendant: If your Honor please——

Mr. Cooper: Just a second, until the Court gets through.

The Court: On Count 2, it is the sentence of the Court that you serve a term of two years in an institution of the penitentiary type to be chosen by the Attorney General of the United States; the sentence to run concurrently with Count 1. On Count 3, it is the sentence of the Court that you serve a term of two years in an institution of the penitentiary type to be chosen by the Attorney General of the United States; the sentence to run concurrently with the sentence on Count 1. I have been very lenient in this matter. I am ordinarily extremely severe under circumstances such as here exist.

Mr. Cooper: Your Honor, the defendant wanted to say something. [52] May he say something now?

The Court: Yes.

The Defendant: Well, I can't talk.

Mr. Cooper: What is it you say, Mr. Kramer?

The Court: He says he can't talk.

Mr. Cooper: I can talk for him, if your Honor please. I presume what he wants to say is he is tubercular.

The Defendant: No, I don't want to say that.

Mr. Cooper: I made that representation before.

The Court: I think he will be better off in the penitentiary than he would be running around, so far as his tuberculosis is concerned. If he behaves himself he will be cured by the time he gets out.

The Defendant: I know I am not guilty. I wanted to say something.

Mr. Cooper: Your Honor, so far as I am concerned, I have prepared a notice of appeal in ordinary form, and, of course, the question of the sentence I couldn't type in, because I didn't know what the sentence was. I don't like, as a rule, to hand papers to the clerk of the Court unless they, at least, look nice and proper.

(Further discussion between Court and counsel reported but not transcribed.)

The Court: Well, ordinarily I would think it would be pretty small, but I don't believe the defendant is going to run away, and I believe the amount of the bond should not be other than sufficiently high to assure the defendant's presence in court when he is needed. The bond on appeal will be fixed in the amount of \$2,500.00.

Mr. Cooper: There is one additional fact, if your Honor please, as far as the reporter is concerned. The reporter has already given me an estimate on what the transcript of the evidence will cost the defendant. [53]

(Further discussion between Court and counsel reported but not transcribed.)

Mr. Cooper: If your Honor please, can we have 90 days in which to prepare the bill of exceptions,

under those circumstances? I have an order to that effect.

The Court: How long a time?

Mr. Cooper: 90 days. As soon as we get the transcript, I am going to give it to your Honor to read, and then I will prepare the bill of exceptions.

The Court: Why do you need 90 days?

Mr. Cooper: They told me I wouldn't get it for three to four weeks. That is what the reporter told me.

The Court: That is all right with me.

Mr. Cooper: I will leave this order, then, to be signed now. That would only be 60 days beyond 30. [54]

DEFENDANT'S EXHIBIT A

Statement of Katherine Wilson at 130 Custom House, San Diego, Calif. on April 27th, 1943 at 7:05 P.M. in the presence of Sgt. K. Grant, Inspector R. Scott and Customs Agent K. G. Linden.

Q. What is your name.

A. Katherine Wilson.

Q. What is your address.

A. 797 East 14th Street, Los Angeles.

Q. Miss Wilson you were arrested today about 4:30 P.M. after having entered the U. S. from Tijuana and there was found on your person a package containing a can in which there was found approximately seven ounces of smoking opium. We want to question you on this subject to find where you obtained the package containing the opium and

advise you that anything you say may be used against you. Are you willing to tell us just how you obtained this package?

A. A fellow that I hadn't seen for a long time by the name of Frank, I met in Tijuana and he asked me how long I was going to be down. I told him I didn't know, we might go back tonight or tomorrow. He asked me if I would do him a favor. I told him I would if I could. He said would you take a package across for me. I said yes I would take it. I put the package in my coat pocket. He said he wasn't going back just yet. I asked him how I was going to get the package to him and he said that I should meet him at the Santa Fe Bus Station tonight at 8:00.

Q. Who was with you when you met this Frank?

A. The ladies was with me but they walked on down the street while I was talking to him.

Q. By ladies you mean Mrs. Irvine and Mrs. Kramer, is that right?

A. That's right. They didn't know nothing about it.

Q. How long have you known this Frank?

A. I imagine about four or five years. [55]

Q. Do you know what he does for living?

A. Only when I knew him in Los Angeles he was working hard on P.W.A. digging ditches.

Q. When was the last time you saw him?

A. About three months ago in San Diego when I was there.

Q. What do you do for a living?

A. I did housework and cooking, I worked for one family ten years but I haven't been able to work for two years. The doctor won't O.K. me. I have a fallen kidney.

Q. How did you come to drive down from Los Angeles to San Diego with Mr. Kramer?

A. He came around to my house on Sunday and said he had a car to sell in San Diego—he was going to sell it to Mr. Wallace. As Mrs. Irvine and I were talking about going down to San Diego to visit Mrs. Wallace, he said we could drive down with him. He came around last night in the evening about this time, but we didn't leave right away. Mrs. Kramer had dinner with Mrs. Irving and I. Mr. Wallace came along later and we all left together.

Q. Where did you go when you reached San Diego?

A. To Mrs. Wallace's it was late and we went to bed.

Q. Who else stayed at Mr. Wallace's?

A. Mrs. Irvine, Mr. Wallace and the Kramers. It was late and we had no place to find a room.

Q. What time did you leave for Tijuana today?

A. I guess it was around noon.

Q. What were your plans at that time?

A. Look around, shop a little, buy a few drinks and come back.

Q. About what time was it when Frank gave you this package containing the opium and the hypo needles?

A. I don't know, I didn't know what time it was when we went across there. [56]

Q. Your meeting this man Frank does not agree with the testimony given by other witnesses in this case. Do you want to tell us just who gave you this package in Tijuana and what you were to do with it.

A. Frank Kramer gave me the package.

Q. Who was present when he gave it to you?

A. He was standing outside the car and everybody else was in the car.

Q. Where in Tijuana did this take place?

A. On the main street near the long bar.

Q. Just what did Kramer say to you?

A. He just said put this in your dress and take it across that's all, but he didn't offer me nothing to take it across.

Q. And did you put it in your dress at that time?

A. No, I stuck it in my pocket.

Q. Was everyone but Kramer in the car when you put the package in your pocket?

A. I'm pretty sure they were.

Q. When did you take it out of your pocket and put the package in your brassiere?

A. He and I were outside the car when he first gave it to me, then I got into the car and we started down the street. We must have rode about half a block and then I put the package in my brassiere.

Q. Who else was in the back seat when you put the package in your brassiere?

A. Gertie and Mr. Wallace, Mrs. Kramer was sitting up front with her husband.

Q. Who knew that Kramer had given you this package?

A. I don't know whether anybody knew he give it to me, he never said nothing.

Q. What had Kramer said about your taking the package across before [57] he gave it to you?

A. He said, here put this in your kick. Then Mrs. Kramer said, is Frank going to buy you some stockings, said, I don't know, he said he was.

Q. Was he going to buy you some stockings because you were carrying this package across the line for him?

A. No, I think he meant for me to pay him back for the stockings.

Q. Did you ask Kramer why he asked you to carry the package instead of Mrs. Kramer?

A. No, I didn't ask no questions at all. We were talking and Mrs. Kramer said that she had no brassiere on and I said that I couldn't go without one. Mrs. Kramer said she didn't like to go without one, but didn't have one on today.

Q. What arrangements were made to deliver the package to Kramer on this side?

A. I didn't make no arrangements, I guess if I got it across I was going to give it to him.

Q. What did he tell you to say if the customs officers found the package?

A. He didn't say anything.

Q. Think carefully now and see if you can remember who saw him give you the package?

A. I am not positive that anybody saw him give it to me.

Q. Was there any conversation about the package or what was in it after he gave you the package and you put it in your pocket?

A. There was a lot of talk but nobody said a word about the package.

Q. There were two needles found in the package with the opium, did you notice those when Kramer gave you the package?

A. I put the package in my pocket. I felt in my pocket and looked and saw the needles and took them out of my coat pocket and put them in the pocket of my blouse.

Q. Are you familiar with hypodermic needles?

[58]

A. I have seen them in the hospital.

Q. What did you think when you saw these hypo needles?

A. Nothing. I know a lot of people use them for adrenalin and things like that.

Q. Are you addicted to the use of narcotics?

A. No.

Q. How long have you known Mr. Wallace?

A. A good many years in San Diego, Los Angeles and in Washington.

Q. Have you ever been arrested before?

A. Yes, but no convictions.

Q. On what charge?

A. Offer, but they dismissed it.

Q. And this man, Frank Kramer, who was in the car with you people this afternoon is the man

who gave you the package containing the opium and the needles in Tijuana and asked you to bring it across the line—is that right? A. Yes.

Q. Is there anything you wish to add to this statement?

A. Nothing else that I know of.

Q. How many times have you been to Tijuana before this?

A. I have been to Tijuana lots of times but not with them.

Q. And you will be willing to testify in court that Frank A. Kramer is the man who gave you the package of opium and needles in Tijuana that was seized on your person this afternoon at San Ysidro?

A. I guess that is the only thing I can do—nobody else did it.

Q. Do you solemnly swear that this statement is the truth, the whole truth and nothing but the truth So Help you God.

A. I swear—that's right he gave it to me.

I have been given an opportunity to read the foregoing statement consisting of four pages and to make any changes that I desire and this statement was made of my own free will without any threats or promises.

KATHERINE WILSON

Subscribed and Sworn to Before Me This 27th day of April, 1943.

F. G. LINDEN,

Customs agent. [59]

SPECIFICATIONS OF ERRORS

The defendant appellant now specifies the errors upon which he will rely upon appeal:

I.

The decision and judgment as to Count 1 is contrary to law and the evidence in that said evidence is insufficient to sustain or justify the judgment. Count 1 specifically charges Katherine Wilson, Frank Kramer and Edgar Wallace did on or about the 27th day of April, 1943, "then and there knowingly, wilfully, unlawfully, feloniously and fraudulently import and bring into the United States certain narcotics in violation of 21 U.S.C. 174."

This section is a companion section of section 173 to 178 of the same Code and is the penalty section. The section itself reads: "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory thereof contrary to law or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought, etc."

Under the decision of *Palermo vs. United States*, 112 Fed. (2) 522; this section which provides the penalty for the acts forbidden by section 173, is a specific section not related to other custom laws and absolutely forbids the importation of smoking opium and provides separate offenses for every act done in connection therewith and under the law, the

importation takes place as soon as the international line is crossed.

Under the evidence of the Government in this case, the facts showed that Katherine Wilson with the other defendants, was stopped at the International Line by customs officers; that after some members of the party had made some declarations of goods that they purchased in Mexico, the custom officers took all the five parties into the custom house where they were searched, and there the can of opium together with two hypodermic needles was found upon [60] the person of Katherine Wilson.

The defendant Kramer drove the automobile Katherine Wilson was riding in and Katherine Wilson testified that Kramer had given her the opium and the narcotic needles in Tijuana. As the importation takes place the minute the narcotics cross the boundary line, certainly Frank Kramer did not import the narcotics. He was not specifically charged with "assisting" in so doing, as he could have been, so therefore as a matter of law, he was not specifically guilty of the offense charged in Count 1.

II.

The decision and judgment as to Count 2 is contrary to the law and the evidence in that the evidence is insufficient to sustain or justify the judgment.

In Count 2, Kramer is charged together with Katherine Wilson and Edgar Wallace as follows: "that they did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive,

conceal, buy, sell and facilitate the transportation and concealment after importation of a certain preparation of opium * * * as said defendants then and there well knew had been imported into the United States of America contrary to law.”

Under the evidence of the Government in this case, the evidence shows that Katherine Wilson had the opium concealed upon her person and that as soon as they were stopped at the Line she was searched and the opium was taken from her person.

Under the law, some act must be done by the defendants or some of them, other than the act of importation, as this provision of 174 is separate and distinct from the importation and provides for an act done after importation. The authorities for this point are:

Pong Wing Quong vs. U. S., 111 Fed (2) 751;

Palermo vs. U.S., 112 Fed (2) 922;

Krench vs. U.S., 42 Fed. (2) 354; [61]

Kurczak vs. U.S., 14 Fed (2) 109.

In each of these cases the narcotics or liquor had already crossed the International Line, and after they crossed the Line, the defendants in each case did some act to conceal or facilitate the transportation of or otherwise the prohibited article. The best case being the case from the 9th Circuit;—Pong Wing Quong vs. U.S. 111 Fed (2) 751.

In that case, after the drugs were in the customs house, the defendant placed a false custom sticker on the trunk so that the trunk could pass the custom officials inspection. So, therefore, as a matter of law

as to this count, the defendant is not guilty as a matter of law, because he did not do any act to aid, assist or abet in the concealment or transportation of said prohibited drugs.

III.

The decision and judgment as to Count 3 is contrary to the law and the evidence in that the evidence is insufficient to sustain or justify the judgment.

Count 3 charges a conspiracy of the three defendants to do the act set forth in Counts 1 and 2.

If the Government's evidence is to be believed regardless of the denials of the defendants, of necessity in order to convict the defendants of the conspiracy "that although it is proper for Congress to create separate and distinct offenses growing out of the same transaction where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of former is a bar to prosecution for latter." Therefore, the conviction of the conspiracy and the substantive offenses in this case are inconsistent and cannot stand.

IV.

The Court erred as a matter of law in denying the motion for a directed verdict and denying the motion for a new trial.

The defendant states that since this decision of the Court [62] in this action that he has discovered evidence which he did not know and could not have discovered by reasonable diligence beforehand. This evidence is set forth in the affidavit of Frank Kramer

hereto attached, marked Exhibit A, incorporated in and made a part of this motion. And, as set forth therein, and as clearly shown during the trial of this case, the defendant from the hearing before the Commissioner was led to believe that Katherine Wilson would testify that a Mexican had given her the can of opium and that the defendant knew nothing about it, and that in so far as the hypodermic needles are concerned, the only information that he had was the information that he received from his wife; that she had seen Katherine Wilson buy the same. That after Mrs. Kramer had testified and the Court made a statement in substance and effect that he did not give credence to Mrs. Kramer's testimony, and that if Mrs. Kramer had known these things she should have told her husband before the car crossed the Line; That Mrs. Kramer became very much hurt and decided to try, if possible, to get evidence to substantiate her story. She went to Tijuana to see the druggist in the drug store there; that while in the drug store at Tijuana on the 9th day of October, according to her statement, she saw the druggist who waited upon her, but did not see the druggist who waited upon Katherine Wilson; that the druggist who waited upon her told her that he recognized her as having been in his store, but that he had no recollection of any transaction concerning hypodermic needles, and that under the law of Mexico, that no record was kept of the sales of such articles; that a child could buy them, and therefore, there was no record in the store of this transaction. Frank Kramer then requested Horace Appel, the attorney for Katherine Wilson to bring Katherine Wilson to

Horace Appel's office so that Frank Kramer could talk to her, and what took place at this interview, among other things, is what is set forth in the affidavit of Frank Kramer.

As to whether or not this testimony is newly discovered [63] is certainly a debatable question as a matter of law, but the fact remains that if Katherine Wilson did admit after the trial that she purchased the hypodermic needles as testified to by Mrs. Kramer, Katherine Wilson, being an accomplice and her testimony being subject to close scrutiny, certainly this would be very strong testimony to discredit all the rest of her testimony in view of the fact that she stated that Frank Kramer gave her both the can of opium and the narcotic needles, and the can of opium was found concealed under her clothes, and the narcotic needles were found in the pocket of her shirtwaist.

Wherefore. Appellant prays that the foregoing be settled and allowed by the Court as defendants and appellants bill of exceptions on appeal from the judgment herein and for all other purposes which a bill of exceptions may be properly used.

JOHN S. COOPER.

Attorney for defendant and
Appellant.

I have read the foregoing Bill of Exceptions, approved it, and stipulate that it may be filed.

CHARLES H. CARR.

U. S. Attorney

By WALTER S. BINNS.

Ass't. U. S. Attorney

The foregoing bill of exceptions is hereby settled and allowed. Jan. 19 1944.

RALPH E. JENNEY,
Judge. [64]

Received copy of the within.....
this 4 day of January, 1944.

CHARLES H. CARR,
By WALTER I. BINNS,
Attorney for Gov.

[Endorsed]: Lodged Jan. 4, 1944. Edmund L. Smith, Clerk, by Irwin Hames, Deputy Clerk.

[Endorsed]: Filed Jan. 19, 1944. Edmund L. Smith, Clerk, by Irwin Hames, Deputy Clerk.

[Endorsed]: No. 10593. United States Circuit Court of Appeals for the Ninth Circuit. Frank Kramer, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Southern Division.

Filed January 24, 1944.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

FILED

APR 17 1944

PAUL P. O'BRIEN,
CLERK

JOHN S. COOPER,

344 Bradbury Building, Los Angeles,
Attorney for Frank Kramer, Appellant.



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No. 10593.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Introduction.

This is an appeal from a judgment of conviction against the defendant below, Frank Kramer, finding him guilty of violation of Section 174, 21 U. S. C. A., as to counts one and two and a conspiracy, Section 88, 18 U. S. C. A., likewise with the defendants one Katherine Wilson and Edgar Wallace to conspire to do the acts set forth in counts one and two of the indictment, defendant Frank Kramer being convicted and sentenced on all three counts.

The conviction as to counts one and two which are commonly referred to as the Jones-Miller Act, relate to a can of opium labeled Hershey's Chocolates, which was brought into the United States from the Republic of Mexico, by his co-defendant Katherine Wilson and found and concealed on her person at the time she crossed the line between the United States and Mexico at a place commonly

known and called San Ysidro, being a town on the border line between the Republic of Mexico and the United States of America.

Count two relates to the concealment of said opium after the importation and count three being a conspiracy to do the acts set forth in counts one and two of the indictment, the venue being laid in the United States because of an overt act committed within the jurisdiction of the United States. The three defendants Katherine Wilson, Frank Kramer and Edgar Wallace; Frank Kramer and Edgar Wallace were jointly charged. The defendant Wilson plead guilty to counts one and two and was granted probation by the trial judge; defendant Frank Kramer was found guilty on all counts and sentenced to the penitentiary; the defendant Katherine Wilson testified against him as a witness for the United States.

Statement.

The evidence is set forth in narrative form in bill of exceptions contained within the transcript of the record beginning with page 22 and following through to page 67. The testimony above referred to is self-explanatory. However, in more condensed form, with reference to the pages above referred to, it shows that the defendant Frank Kramer (disabled veteran of World War No. 1) and dealer in automobiles, as well as the keeper of a garage in Los Angeles, began a transaction in Los Angeles to sell the defendant, Edgar Wallace, a second-hand Ford automobile, Edgar Wallace being a man of the Negro race.

On the date preceding the date set forth in the indictment of the commission of the offense, to-wit: April 27, 1943, the defendant Frank Kramer and his wife, Rose

Kramer; Edgar Wallace and his wife, together with Katherine Wilson and one Mrs. Gertrude Irvin (the last four persons named all being members of the Negro race) left the city of Los Angeles in the Ford automobile, to be sold to Mr. Wallace, and went to San Diego to arrange finances with a branch of the Bank of America, where Mr. Wallace was known. All six persons above referred to stayed at Mr. Wallace's house the night of the 26th. The next morning about the time that the bank opened, Frank Kramer and his wife, Rose Kramer; Edgar Wallace, Katherine Wilson and Gertrude Irvin drove from Edgar Wallace's house to the bank in the Ford automobile. The financing expected could not be arranged. Some, if not all, of the five parties changed most of their American money into American two-dollar bills. This American money being the legal tender in Mexico because of war conditions.

They then drove from the bank across the border line to the town of Tia Juana, Mexico. Upon arriving in Tia Juana the three women with Rose Kramer, a white woman; Katherine Wilson, a Negro woman, and Gertrude Irvin, a negro woman, got out of the Ford automobile and proceeded on a shopping tour in the business section of Tia Juana. Defendant Frank Kramer and Edgar Wallace took the Ford automobile and drove in and around Tia Juana, including many stops at questionable bar rooms and other places. Their room was being watched by the United States Customs Officers. They then came back to the business section of Tia Juana where the three women were shopping. In the automobile, at that time Kramer and Wallace had a Mexican boy in the car that they had picked up on their trip around Tia Juana. These six people

in this Ford automobile then drove this automobile to a house or cabin at or near the old Tia Juana race track. Most of them got out of the car and went into the house, some of them remained in the car. Those that went in the house came out and all got back in the car and the party then returned to the business section of Tia Juana where they let the Mexican boy out. These movements likewise were observed by the United States Customs Officers. The five people above mentioned then stayed around the business section until they were ready to return and the five did return in the same Ford automobile. On arriving at the border line where the customs officers were located the car stopped, all the parties were questioned by the customs officers and they were asked to declare what property, if any, they were bringing into the United States. They declared some property but no mention was made of opium (which could not be declared, or hypodermic needles). All five persons were then taken into the Customs House and they were there searched, being stripped. None, except Katherine Wilson, were found to have narcotics. Upon searching Katherine Wilson they found concealed on her person, under her underclothes, to-wit: her brassiere, a can marked Hershey's Chocolates, which contained a large amount of smoking opium, likewise they found in a pocket of her shirtwaist or blouse two hypodermic needles in their original cellophane wrapping. Upon later being questioned by the investigating customs officers, Katherine Wilson stated in substance and effect that she did not know what was in the can; that the can had been given her by a Mexican by the name of Frank in Tia Juana with whom she had a slight acquaintance who had told her to take it across the line and deliver it to him at

the Santa Fe Bus Station that night when the bus left, together with the hypodermic needles; and she further stated that she could identify the Mexican. The officers then continued in San Diego to further question all of the defendants except Rose Kramer. They all denied any knowledge of the opium or hypodermic needles. Later the officers took Katherine Wilson from the Federal Building to the Santa Fe Bus Station for the purpose of identifying the Mexican whom she said gave her the Hershey's Chocolates. She found no such Mexican. Several statements, certain statements were made to the officers remaining in the Federal Building while Katherine Wilson was at the Santa Fe Bus Station. Upon her return to the Federal Building she changed her statement and signed a written transcription of her statement which in substance and effect says: that while the party was in Tia Juana after they came back from the race track that Frank Kramer handed her the Hershey's Chocolate can and the package that contained the hypodermic needles but she did not know its contents and later at his request she concealed them next to her skin, under her brassiere, that is the can, and put the hypodermic needles in her pocket but that she did not know the contents until she was arrested and was told of the contents by the Customs Officers. As to the facts above related, the banker and the teller at the Bank of America in San Diego were produced as witnesses and testified as to the transactions at the bank. Several Customs Officers testified. Katherine Wilson testified with which evidence the Government completed its case. A motion to dismiss was made to the Court by the attorney for Edgar Wallace and was granted as to him and the defendant Frank Kramer was ordered to proceed with his

defense. Edgar Wallace, Kramer's wife, also himself, were called as witnesses and they all testified fully as to what they claim the facts to be which in substance were that Frank Kramer had not purchased in Mexico any narcotics or hypodermic needles and did not have any transaction with Katherine Wilson. Rose Kramer testified that she saw Katherine Wilson buy the hypodermic needles and also testified by inference or otherwise that Katherine Wilson and Gertrude Irvin had transactions with a Chinaman and a Mexican in Tia Juana.

The evidence also disclosed that Frank Kramer had a criminal narcotic record, both in the State and Federal Courts. That Edgar Wallace had a narcotic record both in the State and Federal Courts; that Mrs. Irvin had a narcotic penitentiary record and was a known smoker of opium and that Katherine Wilson had lived with Mrs. Irvin a large part of her life and knew Mrs. Irvin to be a convict, having been convicted under the State Narcotic Laws and that she, Katherine Wilson, had been arrested in the State Court charged with narcotic violations because of her association with Mrs. Irvin. Rose Kramer had no narcotic record but she had been arrested. The question of fact then before the Court to determine was, who was telling the truth. Was the accomplice, Mrs. Irvin, telling the truth or was Edgar Wallace, Frank Kramer and his wife, Rose Kramer, telling the truth. The Court resolved the doubt against Frank Kramer and adjudged him guilty. A motion for a new trial and amended motions to vacate the verdict and grant a new trial, transcript of record, page 701, motion was denied by the Court after full hearing, an exception being taken, transcript on appeal, page 91, which exceptions reserves to the jurisdiction of the Court, the points on appeal to be made and discussed.

Point I.

The Verdict Is Contrary to the Law and the Evidence, as to All Three Counts.

COUNT I.

Count I specifically charges Katherine Wilson, Frank Kramer and Edgar Wallace did on or about the 27th day of April, 1943, "then and there knowingly, wilfully, unlawfully, feloniously and fraudulently import and bring into the United States certain narcotics in violation of Section 21, U. S. C. 174.

This section is a companion section of Sections 173 to 178 of the same Code and is the penalty section. The section itself reads:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory thereof contrary to law or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought, etc."

Under the decision of *Palermo v. United States*, 112 Fed. (2d) 922, this section, which provides the penalty for the acts forbidden (39) by Section 173, is a specific section not related to other custom laws and absolutely forbids the importation of smoking opium and provides separate offenses for every act done in connection therewith and under the law, the importation takes place as soon as the international line is crossed.

Under the evidence of the Government in this case, the facts showed that Katherine Wilson with the other defendants, was stopped at the international line by custom

officers; that after some members of the party had made some declarations of goods that they purchased in Mexico, the custom officers took all the five parties into the custom house where they were searched, and there the can of opium together with two hypodermic needles was found upon the person of Katherine Wilson.

The defendant Kramer drove the automobile Katherine Wilson was riding in and Katherine Wilson testified that Kramer had given her the opium and the narcotic needles in Tia Juana. As the importation takes place the minute the narcotics cross the boundary line, certainly Frank Kramer did not import the narcotics. He was not specifically charged with "assisting" in so doing, as he could have been, so therefore as a matter of law, he was not specifically guilty of the offense charged in Count I.

COUNT II.

In this count, Kramer is charged, together with Katherine Wilson and Edgar Wallace, as follows:

"that they did then and there knowingly, wilfully, unlawfully, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of a certain preparation of opium * * * as said defendants then and there well knew had been imported into the United States of America contrary to law."

Under the evidence of the Government in this case, the evidence shows that Katherine Wilson had the opium concealed upon her person and that as soon as they were stopped at the line she (40) was searched and the opium was taken from her person.

Under the law, some act must be done by the defendants or some of them, other than the act of importation, as this provision of 174 is separate and distinct from the importation and provides for an act done after importation. The authorities for this point are:

Pong Wing Quong v. U. S., 111 Fed. (2d) 751;

Palermo v. U. S., 112 Fed. (2d) 922;

Krench v. U. S., 42 Fed. (2d) 354;

Kurczak v. U. S., 14 Fed. (2d) 109.

In each of these cases the narcotics or liquor had already crossed the international line, and after they crossed the line, the defendants in each case did some act to conceal or facilitate the transportation of or otherwise the prohibited article. The best case being the case from the Ninth Circuit: *Pong Wing Quong v. U. S.*, 111 Fed. (2d) 751.

COUNT III.

This count charges a conspiracy of the three defendants to do the act set forth in Counts I and II.

If the Government's evidence is to be believed regardless of the denials of the defendants, of necessity in order to convict the defendants of the conspiracy "that although it is proper for Congress to create separate and distinct offenses growing out of the same transaction where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of former is a bar to prosecution for latter." Therefore, (41) the conviction of the conspiracy and the substantive offenses in this case are inconsistent and cannot stand.

The above discussion relates to the evidence produced at the trial of the case.

After the trial thereof, the defendant included in his motion an affidavit as to his newly discovered evidence which consisted principally of perjury on the part of Katherine Wilson, the known accomplice. The Court held a hearing upon this and examined Katherine Wilson himself. The transcription of these proceedings are contained with the transcript on appeal beginning with page 82 and ending with page 107. As above stated an exception was taken to the ruling of the Court upon the denial of his motion for a new trial.

This brings use to the discussion of a point as to the whole case to-wit: point 2, the evidence is insufficient to sustain or justify the conviction on any one of the three counts. The reason being as follows:

While it is true in the Federal Court that a defendant may be convicted upon the uncorroborated testimony of an accomplice, this rule has modifications, limitations interpretations and exceptions, the principal one being that where the evidence is before the trial court that the court has a right to adjudge as to the credibility of the witnesses produced at the trial. However, if the case be one that is tried before a jury, the court is compelled to instruct the jury that while a witness can be convicted upon the testimony of an accomplice, that the testimony of an accomplice should be viewed with suspicion and distrust, for the reason of the fact that he or she is a party to the crime and that he or she may have some ulterior motive in so testifying, therefore, if the rule applies to the jury certainly it applies to the judge sitting as a jury in trying the case without a jury. The trial judge in this case is an

eminent and learned lawyer, learned both in State and Federal law and was and is, well aware of the rule set forth under Section 1111 of the Penal Code of the State of California and likewise the rule above set forth as to the testimony of accomplices in the Federal Court. The question is therefore, raised by the writer of this brief: Has the Court's knowledge of the law caused his judgment to be changed were he sitting as a juror in the same connection of the case in the Federal Court where he was instructed by the Court as to the rule in the Federal Courts. A citation of authorities as to this point would be so numerous and so cumbersome as to be annoying particularly to the members of this Court who know the right of this brief. Therefore, suffice it to say the above statement is elementary law, the one versed in the trial of criminal cases in the Federal Court of which all the members of this Court were and so to revert in to the citation of a decision of the Appellate Courts but to an incident to the trial of a case in the United States District Court before one Judge Rudkin who was then sitting as a judge in the United States District Court in Los Angeles. This judge after being a member of this Court and was at the time of his death. The defendant's name was Wong, the case was tried in the court room in the Federal Building built for Judge Erskine Ross. The attorneys for the defendant were Le Compte Davis and John S. Cooper, the case was tried about the year 1913 or 1914. The facts were as follows:

The Mexican accomplice, one Ramiro (I believe) brought the opium across the line, delivered it to a Chinaman in California or Arizona. This Chinaman brought the opium to the defendant's house and the Mexican ap-

peared there for collection of the money for the opium. He testified against the Chinaman, Wong. Judge Rudkin not only instructed the jury as to the law but discussed the facts with them, saying in substance and effect:

“Gentlemen: I know, as a federal judge, that an informer under the revenue laws of the United States receives a monetary consideration, provided the defendant is convicted in the United States District Courts. The Government has offered this informer to you as a witness. I do not believe this testimony. He is an accomplice; the defendant cannot be convicted upon his testimony alone, provided you believe him, but how can you believe a Mexican who only expects to receive American money provided the defendant is convicted. The defendant is a Chinaman he has sworn under oath and, generally speaking, his oath is taken in the name of our God and not his. But regardless of either of those apparently from all the circumstances in this case the Chinaman, the defendant herein, is the man who told the truth, but gentlemen, I cannot decide the question of fact. That question must be decided by you and you alone because you as the triers of fact in this case are the judges of the facts and must return the verdict of guilty or not guilty.”

The verdict in that case was not guilty and so it should have been in the Kramer case.

Frank Kramer had been and may be also at the time of trial or shortly prior thereto addicted to the use of narcotics, the narcotics he used, however, was not smoking opium, but was morphine sulphane. He being, as shown by the records, one of those unfortunate veterans of the

World War No. 1, who was disabled. Seriously, in the World's War No. 1, the medical facilities in that war, as this Court judicially knows, were the best that the time afforded but they had not reached the perfection as shown in World's War No. 2. Therefore, those unfortunate ones in hospitals in France, upon being returned on hospital boats, were given morphine sulphane by nurses and doctors, as this Court knows, many thousands of those addicts which the Government itself has made.

Clarence C. Lewis v. U. S., 295 Fed. 678.

The evidence shows distinctly in this case that the friend and companion, or relative of Katherine Wilson, Mrs. Irvin was known as a smoker of opium. Mrs. Irvin was dead at the time of trial and could not speak; her memory was sacred to Katherine Wilson and therefore, Katherine Wilson testified falsely when she says that Frank Kramer gave her the opium because she was not bringing opium across the line for Frank Kramer, but for Gertrude Irvin.

The State of California case wherein Judge Albert Lee Stephens discussed and analyzed the meaning and effect of circumstantial evidence is the case of *People v. Groves*, 137 Cal. App., page 1, and following. This is not a discussion about opium and therefore the district attorney in his reply brief will harp and harp upon the subject that is in the "Hack" because the man was there charged with bribery and this defendant is charged with importing smoking opium but that case discusses the rule of circum-

stantial evidence from the beginning of time to the present day leading discussion in the opinion of the writer of this brief now existing within the State of California and the statement includes the decision of the Federal Courts within this State.

Therefore, the interpretation to be placed upon circumstantial evidence on appeal is set forth in the case of *People v. Staples; People v. Lamson*, 1 Cal. Rep. (2d), page 648, wherein Judge John Preston, a former United States District Attorney, stated the rule as apply to Federal Courts to be as follows:

“It will be perceived that the evidence in the case relied on to establish the guilt of the defendant is practically circumstantial, and it is elementary law that where the evidence is of such a character it must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis. The deduction to be drawn from these circumstances is ordinarily one for the jury, but where, in a case such as this, every circumstance relied on as incriminating is equally compatible with innocence, there is a failure of proof necessary to sustain a conviction, and the question presented is one of law for the court. The prosecution has the burden of proof. The defendant is presumed innocent until the proof satisfies the jury beyond a reasonable doubt of his guilt. The right of a jury to return a verdict of guilty is not an arbitrary right. The sufficiency of their verdict must be tested by determining whether the evidence upon which that verdict is framed was of such a character that they could say from it that in their judgment no reasonable doubt of the defendant's guilt existed.”

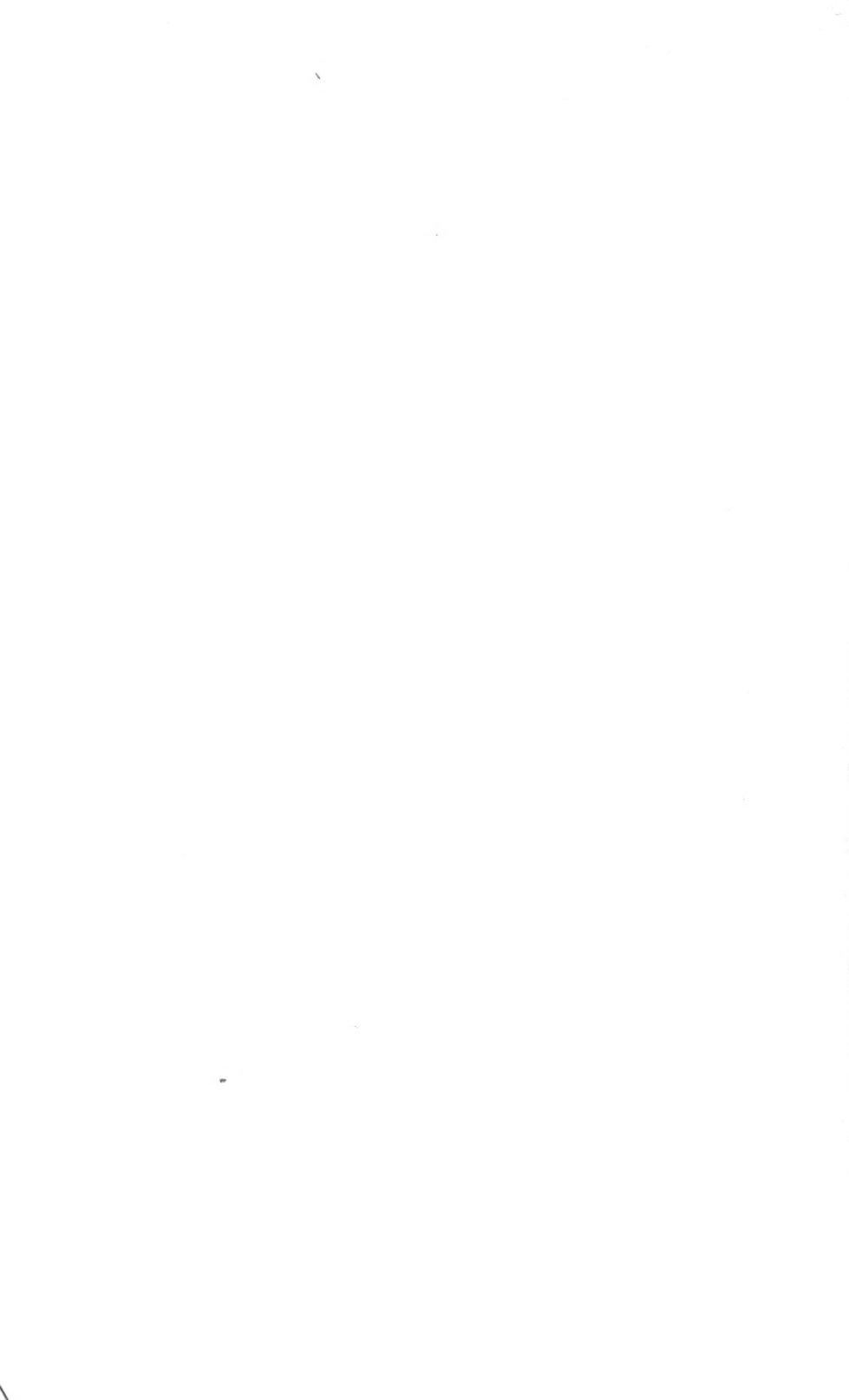
This is the rule in the Federal Court. This was the rule in California at the time Judge Preston delivered his opinion and should be the rule in all courts as it is a rule of the Supreme Court of this our United States.

Therefore, we say that the points raised by this appeal are that the evidence is insufficient to sustain or justify each count as a matter of law of the United States and that the evidence is insufficient to sustain or justify any of the counts as a matter of law and evidence and this Court as the Appellate Court of this, our Ninth Circuit should reverse this case and order it dismissed as did this Court in the case of *Clarence E. Lewis v. United States*, 295 Fed. 678, wherein another disabled veteran was a victim of incriminatory circumstances because of the addiction of narcotics which the Government itself caused.

Respectfully submitted,

JOHN S. COOPER,

Attorney for Frank Kramer, Appellant.



No. 10593

IN THE

15
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 10593

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

(A) *The United States District Court* for the Southern District of California had jurisdiction of the appellant and subject-matter as to count one of the indictment under Section 174 of Title 21, United States Code, making it unlawful for any person to fraudulently or knowingly import any narcotic drug into the United States contrary to law, and, in count two of the indictment under the same section and title, to knowingly or unlawfully conceal or facilitate the transportation of any narcotic drug after importation. Similarly the United States District Court for the Southern District of California had jurisdiction of both appellant and subject-matter as to count three of the indictment under Section 88, Title 18, United States Code, defining the crime of conspiracy.

(B) *The indictment* alleged in count one that appellant Frank Kramer, Katherine Wilson, and Edgar Wallace on or about April 27, 1943, at San Ysidro, San Diego County, California, did then and there knowingly, wilfully, unlawfully, feloniously, and fraudulently import and bring into the United States from the Republic of Mexico certain narcotic drugs, to-wit: approximately 8 ounces of smoking opium, contrary to law.

Count two of the indictment alleged that each of the above defendants on or about April 27, 1943, at San Ysidro did then and there knowingly, wilfully, unlawfully, feloniously, and fraudulently receive, conceal, buy, sell, and facilitate the transportation and concealment of approximately 8 ounces of smoking opium after importation of the narcotic.

The final count of the indictment charged appellant and defendants with a conspiracy and alleged in substance that prior to the dates of the commission of the alleged overt acts set forth in the indictment and continuously thereafter to and including the date of its presentation defendants did knowingly and feloniously conspire and confederate to commit those offenses previously charged in the indictment. Five overt acts were alleged in support thereof.

(C) *This court has jurisdiction* of the appeal under the provisions of Section 225(a) and (d), Title 28, United States Code.

Statement of the Case.

This is an appeal by appellant Frank Kramer from a judgment after trial in the District Court and a finding of guilt on all three offenses as charged in the indictment, sentencing appellant for a period of 2 years on each count, each sentence of imprisonment to begin and run concurrently with each of the other two counts. A jury was waived in the District Court by the respective parties with the consent of the trial judge.

Summary of the Evidence.

Appellant in his opening brief, commencing at page 2 thereof, purports to set forth a summary of the evidence introduced at the trial of the cause. As that summary neglects to depict some of the more important evidence disclosed at the time of trial and as appellant contends that the judgment of the court is not only contrary to the law but also to the evidence, it is perhaps advisable for the government to herein set forth a more accurate statement of the evidence produced in the District Court.

Evidence.

Appellant Kramer, a garage keeper and dealer in second-hand automobiles in the city of Los Angeles, on April 26, 1943, began a transaction to sell defendant Edgar Wallace, a negro, a 1941 Ford automobile belonging to one Cusack. [R. 49-51, 54, 62.] On April 26, 1943, appellant and his wife, Mrs. Rose Kramer, defendant Katherine Wilson, Mrs. Gertrude Irvin, and defendant Edgar Wallace, together with his wife, drove from the city of Los Angeles in the Ford automobile to San Diego apparently to arrange financing the vehicle at a

branch of the Bank of America where defendant Wallace was known. The party arrived in San Diego sometime early in the morning of the 27th and all six of the persons previously referred to passed the early hours of the morning at the Wallace house. [R. 27, 31, 54, 62.]

At about 10:00 o'clock a. m., that morning, the date set forth in the indictment for the commission of the offenses, appellant Kramer, together with his wife, Rose Kramer, defendant Wallace, and Katherine Wilson proceeded to the Bank of America to arrange financing of the automobile, but, as Wallace was unable to meet the terms imposed by the bank, the expected financing could not be arranged. Wallace thereupon changed approximately \$240.00 into \$2.00 bills for himself and members of the party in order that this sum could be carried across the international line separating the United States and the Republic of Mexico. [R. 23-26, 54, 63.] The party then proceeded to the border town of Tijuana, Mexico, and arrived there at approximately 11:00 a. m. [R. 27.]

After arriving in Tijuana, the three women, Rose Kramer, Katherine Wilson, and Gertrude Irvin, the latter two being members of the negro race, departed from the men and proceeded to shop approximately 2 or 3 hours in the various stores and shops located in the town. [R. 34, 56, 59.] Thereupon the two men, appellant Kramer and defendant Wallace, drove away. Customs Patrol Inspector George Buncasel at about 11:30 or 12:00 noon observed the Ford sedan with the two men in it and followed the vehicle for about an hour as it was being driven about Tijuana. At Fifth Street near Avenue Revolution the car stopped and Wallace entered the side door of a saloon, where he spent several minutes. He soon re-

turned and the car proceeded to the business section of the town where it was parked and appellant Kramer entered a combination billiard hall and restaurant, known as "La Corona." Wallace, however, loitered about the street until appellant returned. Upon Kramer's return they proceeded to a place known as "Enrugui's" where Wallace entered the building and returned in about 5 minutes, whereupon the pair drove toward the main thoroughfare. Inspector Buncasel then returned to his station at the San Ysidro point of entry. [R. 43-44.]

Shortly thereafter the appellant and Wallace contacted a Mexican boy named "Joe," allegedly to find them some Mexican girls. [R. 56-57, 63.] However, before they had an opportunity to find the girls they met the three women of their party and all decided to drive to the Mexican guide's house near an abandoned race track. All members of the party except Katherine Wilson entered the house where they remained for a short time and all thereafter returned to the business section of the town. [R. 34, 40, 45, 55-57, 63, 64.] Upon reaching the main street the women were let out of the automobile and the men again drove away to return in approximately one and one-half hours. The women during this interval continued to shop. [R. 27, 34, 55, 57, 59.] At the end of this period appellant and defendant Wallace returned to the main street of Tijuana where they met defendant Katherine Wilson; Mrs. Kramer, however, was in a store trying on a hat. As they were walking down the street toward the store where appellant's wife was making her purchases, appellant handed defendant Katherine Wilson a Hershey's cocoa can containing approximately 8 ounces of smoking opium and a package containing several

hypodermic needles and stated, "Here, carry this." Defendant Wilson apparently thought nothing of this request and placed the can and package of hypodermic needles in her coat pocket. They then proceeded to the store to contact Mrs. Kramer. At the store, however, appellant asked Katherine Wilson where she had placed the packages and on being informed that they were in her pocket stated, "You better put it away good." Subsequently but prior to leaving Tijuana, Mrs. Kramer asked appellant to purchase some stockings for defendant Wilson. In response to this request appellant stated to Miss Wilson, "Buy you some? * * * Well, you will have to work for it." [R. 27-28, 34-36, 41-42.] After leaving the store Miss Wilson went into the restroom of the Long Bar where she placed the can of opium in her brassiere and the small package containing the hypodermic needles in her shirt waist pocket. [R. 28-29, 36.] Thereupon the five persons returned to the port of entry at San Ysidro at approximately 4:00 or 4:30 in the afternoon of the same day. [R. 45-46.]

As San Ysidro, after the five persons crossed the international line separating the United States and the Republic of Mexico, Customs Guard J. T. Mitchell inspected the Ford sedan and informed the party that they had been seen where narcotics were sold and then asked each person for his declaration. Appellant Kramer stated that he had brought nothing from Mexico; defendant Wilson declared some hose; Wallace stated that he had brought nothing from Mexico, while Mrs. Kramer and Mrs.

Irvin declared small purchases of cosmetics, hose, and slippers. The guard thereupon asked all persons in the car if they had anything else to declare and when answered in the negative requested that the automobile be driven to the side of the inspection station. Acting Inspectress Mary Clark and another proceeded to search the women and in the course of the examination the Hershey's cocoa can containing the opium and the needles were found on the person of Katherine Wilson. Subsequently appellant Kramer, Wallace, and defendant Wilson were questioned by the customs agents; the former two denied any knowledge of the narcotics or needles. However, Katherine Wilson signed a typewritten statement in which she stated that she had received the opium from a Mexican named "Frank," who requested her to deliver the can at the Santa Fe Bus Depot at San Diego. Thereupon several customs officers took defendant Wilson to the depot for the purpose of identifying the Mexican. When no such person was found, she was returned to the Customs and Court House Building, where she admitted that appellant gave her the narcotics and needles to bring across the international line. [R. 37-38, 41, 46, 48, 53, 64.]

The record discloses that appellant Kramer had a previous criminal record involving burglary and impersonation of a federal officer and that Wallace had been convicted of felonies involving thefts and violations of the Harrison Narcotic Act; similarly, both Mrs. Irvin and defendant Katherine Wilson had been previously charged with narcotic violations under the state laws, Mrs. Irvin having served a penitentiary sentence. [R. 30-31, 39, 58. 66.]

Questions Presented by the Appeal.

I. Relating to count one as charged by the government in the indictment, was the judgment of the court as to appellant Kramer contrary to the law and evidence as appellant was charged therein as a principal rather than “assisting” in the commission of the offense?

II. As the evidence of the government disclosed that Katherine Wilson had the opium concealed on her person after crossing the border, could appellant be properly charged in count two of the indictment with having unlawfully and feloniously received, concealed, and facilitated the transportation after importation of the narcotics?

III. Was the conviction of appellant based upon the offenses enumerated in counts one and two of the indictment a bar to appellant’s conviction of a conspiracy to commit those substantive offenses?

IV. Was the evidence as presented by the government sufficient to sustain and justify the conviction on any one of the three counts?

ARGUMENT.

I.

Under the Evidence and the Law Appellant Was Properly Charged in the Indictment as a Principal.

In this connection it is contended by appellant at page 8 of his opening brief that

“As the importation takes place the minute the narcotics cross the boundary line, certainly Frank Kramer did not import the narcotics. He was not specifically charged with ‘assisting’ in so doing, as he could have been, so therefore as a matter of law, he was not specifically guilty of the offense charged in Count I.”

Appellant, however, has apparently overlooked the provisions of Section 550, Title 18, United States Code. That section reads as follows:

“ ‘Principals’ defined. Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.”

Thus this act of Congress abolishes the distinction between principals, accessories, aiders, and abettors, and, when it is disclosed by the evidence that appellant must be considered as having procured and aided the commission of the offense charged in the indictment, he is properly charged as a principal.

A similar question was raised in the case of

Jin Fuey Moy v. United States, 254 U. S. 189, 41
Sup. Ct. 98, 65 L. Ed. 214.

There the indictment directly charged a physician with the unlawful sale of narcotic drugs. The Supreme Court held that the indictment could be construed under this section (Section 550, Title 18, United States Code) as charging that the physician aided and abetted a sale by another and that proof that he aided an unlawful sale by a druggist, by means of an unauthorized prescription, sustained the charge of a sale not made by himself.

Likewise, in

Brickey v. United States, 123 F. (2d) 341, 345,
346 (C. C. A. 8th),

it was concluded that an official of a bank who had been charged as a principal in the indictment for making false entries in a report to the Federal Deposit and Insurance Corporation could be convicted and punished as a principal upon proof that he merely directed another to make the false entries.

In

Colbeck et al. v. United States, 10 F. (2d) 401
(C. C. A. 7th),

the question of indicting an accessory as a principal again arose. The Circuit Court of Appeals in discussing this assignment of alleged error stated at page 403:

“Under section 332 of the Criminal Code (Comp. St. §10506), accessories before the fact are principals, and it has been held that an accessory before

the fact may be charged as a principal, and the charge will be sustained by proof showing him to be an accessory before the fact.”

Citing:

Vane v. United States, 254 Fed. 32 (C. C. A. 9th);
Di Preta v. United States, 270 Fed. 73 (C. C. A. 2d).

It would appear that the assignment of alleged error raised by appellant in point I of his opening brief has no merit and an extended discussion of this point would serve no useful purpose as the matter has been settled not only by the cases cited, *supra*, but also by the following:

Meyer v. United States, 67 F. (2d) 223 (C. C. A. 9th);

United States v. Hodorowicz, 105 F. (2d) 218 (C. C. A. 7th); cert. den., 308 U. S. 584, 60 Sup. Ct. 108, 84 L. Ed. 489;

Tucker, et al. v. United States, 299 Fed. 235 (C. C. A. 7th);

Kelly v. United States, 258 Fed. 392 (C. C. A. 6th); cert. den., 249 U. S. 616, 39 Sup. Ct. 391, 63 L. Ed. 803.

II.

Appellant, Under the Evidence Produced by the Government at the Trial of the Cause in Connection With Count Two of the Indictment, Was Properly Charged With Having Unlawfully and Feloniously Received, Concealed, and Facilitated the Transportation After Importation of the Narcotics.

In this connection it is urged by appellant Kramer that, as the evidence reveals that Katherine Wilson rather than appellant had the narcotics concealed upon her person and that as some act had to be done other than the mere importation, conviction on this count cannot stand.

However, in

Pon Wing Quong v. United States, 111 F. (2d)
751 (C. C. A. 9th),

the problem of facilitating the transportation and concealment of narcotics immediately after the crossing of international lines was similarly presented. The appeal there arose from a judgment of conviction on 3 counts for violations of the Jones-Miller Act (Section 174, Title 21, United States Code). The first count accused appellant of fraudulently and knowingly importing smoking opium; the second count charged him, of facilitating the transportation of the narcotics; while the third accused the appellant of fraudulently and knowingly concealing and facilitating the concealment of the opium after its importation into the United States.

The evidence in that case disclosed that customs officials had been informed that an attempt was under way to smuggle into the country contraband smoking opium; and, while watching a trunk containing the narcotics as it was still in customs, they observed the appellant place a customs label upon the corner of the trunk. The appellant was convicted of the substantive offense by virtue of the statute making an aider and abetter a principal. (Section 550, Title 18, United States Code.)

This court in affirming the judgment of conviction stated at page 756, in language particularly appropriate to the instant cause:

“With the fact of importation established when the S. S. ‘President Coolidge’ crossed the three mile limit approaching San Francisco (United States v. Caminata, D. C. Pa., 1912, 194 F. 903, and Fiddelke v. United States, *supra*), the problem of facilitating the transportation after such crossing of the line is presented. After the trunk was landed in the corral it was not actually moved, except by the customs officers, and if actual movement after its arrival in the corral were the requisite for the commission of the crime of facilitating transportation after importation it could not be held to have been committed. However, here the trunk containing the opium was in the act of being transported after importation from the time it left the three mile limit until it reached its intended destination in the United States, to-wit, delivered to the consignee. *Anything done to make the continuance of that trip ‘less difficult’ would constitute facilitation of its transportation.* Since the term ‘facilitate’ seems not to have

any special legal meaning, the framers of this statute must have had in mind the common and ordinary definition as expressed by a standard dictionary. Quoting from Webster's Unabridged Dictionary, 'facilitate' is defined as follows: 'To make easy or less difficult; to free from difficulty or impediment; as to facilitate the execution of a task.'

"The only reason for the placing of the sticker on the trunk was to permit the trunk and its contents to pass through the customs without inspection. Certainly this act made the progress of transportation of the trunk 'less difficult' and 'freed it from difficulty or impediment' and in short facilitated transportation. The method of facilitation used was not one of actual physical movement at the moment but rather one related to the continuity of the trunk's present status of being in the course of transportation. It is unnecessary to more than cite a reference wherein numerous cases are cited supporting the view that temporary stoppage of goods in the stream of commerce does not interrupt the continuity of transportation. See 11 Am. Jur. p. 60, f. n. 4.

"The same objection as made to the failure to prove the *corpus delicti* in the second count is made to the third count, as to the crime of facilitating the concealment of the opium after importation. The act of pasting the sticker upon the trunk was one which concealed the fact that the trunk contained contraband by representing that it had been inspected and was released from customs. *Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment.*" (Emphasis supplied.)

In the instant case the government's evidence disclosed that appellant drove the automobile carrying Miss Wilson across the international line and was held at the customs inspection station by agents where he was asked by a customs guard whether or not he had brought anything from Mexico. He stated that he had brought nothing, as did defendant Wilson. [R. 29, 46.] It thus appears that appellant attempted to mislead the customs officers to avoid their finding of the concealed narcotics. It is respectfully submitted that these actions of appellant were sufficient to constitute a facilitation of transportation and concealment within the meaning of the statute.

Nor was it material that Katherine Wilson had the narcotics concealed on her person rather than appellant.

In

United States v. Cohen, 124 F. (2d) 164 (C. C. A. 2d), cert. den., 315 U. S. 811, 62 Sup. Ct. 796, 86 L. Ed. 210, rehrg. den., 316 U. S. 707, 62 Sup. Ct. 941, 86 L. Ed. 1774,

a similar question was presented. In affirming the conviction of appellants the court at page 165 stated:

"Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States v. Hodorowicz*, 7 Cir., 105 F. (2d) 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; *Vilson v. United States*, 9 Cir., 61 F. (2d) 901."

III.

Appellant's Conviction, Based Upon Counts One and Two, Constitutes No Bar to a Conviction of a Conspiracy to Commit Those Substantive Offenses Charged in the Indictment.

With reference to this contention appellant argues at page 9 of his opening brief

“* * * ‘that although it is proper for Congress to create separate and distinct offenses growing out of the same transaction where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of former is a bar to prosecution for latter.’ Therefore, the conviction of the conspiracy and the substantive offenses in this case are inconsistent and cannot stand.”

It is well settled, however, that the crime of conspiracy is a separate offense from that of the objective crime sought to be accomplished through the agreement.

United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211;

Marino et al. v. United States, 91 F. (2d) 691 (C. C. A. 9th);

Hall v. United States, 78 F. (2d) 168 (C. C. A. 10th);

Enrique Rivera et al. v. United States, 57 F. (2d) 816 (C. C. A. 1st);

Gerson v. United States, 25 F. (2d) 49 (C. C. A. 8th).

This is true whether or not the objective sought to be accomplished is successfully consummated, as the crime is

complete when an overt act to effect the object of the conspiracy has been accomplished.

Heike v. United States, 227 U. S. 131, 33 Sup. Ct. 226, 57 L. Ed. 450;

McDonald v. United States, 89 F. (2d) 128 (C. C. A. 8th), cert. den., 301 U. S. 697, 57 Sup. Ct. 925, 81 L. Ed. 1352; rehrg. den., 302 U. S. 773, 58 Sup. Ct. 4, 82 L. Ed. 599;

United States v. Shapiro, 103 F. (2d) 775 (C. C. A. 2d); cert. den., 301 U. S. 708, 57 Sup. Ct. 942, 81 L. Ed. 1362;

Curtis v. United States, 67 F. (2d) 943 (C. C. A. 10th);

Graham v. United States, 15 F. (2d) 740 (C. C. A. 8th); cert. den., 274 U. S. 743, 47 Sup. Ct. 587, 71 L. Ed. 1321.

Further, a prosecution charging a conspiracy to commit an offense against the United States, together with a prosecution for the substantive offense made the object of the conspiracy is proper where there is no complete identity between the two crimes.

In

Laughter v. United States, 259 Fed. 94 (C. C. A. 6th); cert. den., 249 U. S. 613, 39 Sup. Ct. 388, 63 L. Ed. 802,

appellant, who was previously convicted of a conspiracy to violate the Reed amendment, was subsequently convicted of the substantive offense to which the conspiracy related. The question of double jeopardy was raised by appellant on appeal. The court in affirming judgment at page 99 stated:

“In this case, No. 3212, Laughter insists that he has been twice punished for the same offense, and

thus raises, in another aspect, the proposition that the conspiracy and the substantive offense cannot be separately prosecuted. The general unsoundness of this claim has already been discussed. So far as there may be in any case a relation between the two which ought to prevent a double prosecution, it will be only in those cases where there is complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense. That complete identity does not here exist. The actual taking of the liquor from the river boat onto the shore was alone sufficient to constitute participation in interstate transportation and to justify conviction of the substantive offense; but this act was neither pleaded as one of the overt acts in the conspiracy case, nor was it essential to make out guilt of the conspiracy. The utmost effect of such similarity as here existed in the proofs relied upon to show the two offenses was to advise the discretion of the court in imposing the second sentence; it cannot support any claim of error."

Further authority may be found in

Hall v. United States, 109 F. (2d) 976 (C. C. A. 10th);

Sneed v. United States, 298 Fed. 911 (C. C. A. 5th); cert. den. 265 U. S. 590; 44 Sup. Ct. 635; 68 L. Ed. 1195;

Goukler v. United States, 294 Fed. 274 (C. C. A. 3rd);

Murry v. United States, 282 Fed. 617 (C. C. A. 8th);

United States v. Nash, et al., 51 F. (2d) 253 (D. C. N. Y.); aff., 54 F. (2d) 1006; cert. den., 285 U. S. 556, 52 Sup. St. 457, 76 L. Ed. 945; *Cor. Juris.*, Vol. 16, p. 280.

IV.

**The Evidence as Presented by the Government Was
Sufficient to Sustain and Justify the Conviction
on Any One of the Three Counts.**

In this connection appellant urges this Honorable Court to the effect that his conviction should be set aside as one of the governments witnesses, Katherine Wilson, was an accomplice to the crime and consequently her testimony should have been disregarded by the trial judge.

It is well settled, however, that, although such testimony should perhaps be carefully scrutinized by the jury or trial judge, nevertheless a conviction may well rest upon the uncorroborated testimony of an accomplice.

Hass v. United States, 31 F. (2d) 13 (C. C. A. 9th); cert. den., 279 U. S. 864, 49 Sup. Ct. 480, 73 L. Ed. 1003;

Ahearn v. United States, 3 F. (2d) 808 (C. C. A. 9th); cert. den., 268 U. S. 692, 45 Sup. Ct. 511, 69 L. Ed. 1160;

Caminetti v. United States, 220 Fed. 545 (C. C. A. 9th); aff., 242 U. S. 270, 37 Sup. Ct. 192, 61 L. Ed. 442;

Lung v. United States, 218 Fed. 817 (C. C. A. 9th);

United States v. Riedel, 126 F. (2d) 81 (C. C. A. 7th);

United States v. Quinn, 124 F. (2d) 378 (C. C. A. 2d);

United States v. Fawcett, 115 F. (2d) 764 (C. C. A. 3rd);

Hall v. United States, 109 F. (2d) 976 (C. C. A. 10th).

Moreover in the instant case evidence produced by the government at the time of trial tended to and did substantially support the testimony of Katherine Wilson. [Testimony of Joseph Zung, R. 23-25; Dorothea Bullock, R. 25-26; Customs Inspectors Buncasel, Scott, and Mitchell, R. 43-46; Customs Agent Linden, R. 48, 53, and Acting Inspectress Mary Clark, R. 47-48.]

Further, the record discloses, contrary to appellant's contention, that the trial judge carefully weighed the evidence and testimony produced at the time of trial and determined the relative veracity of each witness. After trial and prior to the determination of guilt, the trial judge commented on the evidence produced by both the government and defense and in connection therewith stated:

"Now, there is an absolute conflict here in the evidence on some very definite points, and as I say, whether I like it or not, I have to believe one side or the other. Now, I must be perfectly frank. I didn't believe Mrs. Kramer. I don't believe that she took the stand and told the truth, if I have to judge it from my knowledge of human reactions. * * * She knew that they had brought some colored people down in Tijuana. Whether she knew that two of them were or had been narcotic addicts doesn't develop. I don't think it makes very much difference. It is rather hard for me to believe that she rode down there with these three colored people just as a pleasure trip * * * I did not believe Mr. Kramer, either, to be perfectly frank. It is human to

want to save yourself, naturally, from severe punishment. And I think he told the best story he could, but it didn't convince me, and I don't believe it would have convinced the jury, if we had been fortunate enough to have a jury here. I don't believe that Kramer came down here on any social visit, or went down to Tijuana with these three colored people on any social visit, or on any such innocent expedition as he contends. * * * and I am frank to say I did believe the Wilson woman." [R. 68-71.]

Even assuming, however, but certainly not conceding, that the evidence failed to support appellant's conviction on any one or two counts charged in the indictment, nevertheless, where appellant has received concurrent sentences as here [R. 10], none of which exceeds the maximum penalty perscribed by the statute, and the evidence is sufficient to justify a conviction on any one count, appellant cannot complain of error on appeal.

United States v. Trenton Potteries Company, et al.,
273 U. S. 392, 47 Sup. Ct. 377, 71 L. Ed. 700;

Claassen v. United States, 142 U. S. 140, 12 Sup.
Ct. 169, 35 L. Ed. 966;

Sugarman v. United States, 35 F. (2d) 663 (C.
C. A. 9th); cert. den., 281 U. S. 723, 50 Sup.
Ct. 239, 74 L. Ed. 1141;

Taran v. United States, 88 F. (2d) 54 (C. C.
A. 8th);

Flowers v. United States, 83 F. (2d) 78 (C. C.
A. 8th);

Chepo v. United States, 46 F. (2d) 70 (C. C.
A. 3rd).

Conclusion.

From the foregoing it is respectfully submitted by the government that the judgment of the trial court was not contrary to law and that the evidence produced at the trial of the cause was ample to support appellant's conviction upon all 3 counts as charged in the indictment.

Respectfully submitted,

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United States Attorney,

JAMES M. CARTER,
Assistant United States Attorney,

WILLIAM L. RITZI,
Assistant United States Attorney,
Attorneys for Appellee.

APPENDIX.

United States Code, Title 21, Section 174.

“If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

United States Code, Title 18, Section 88.

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

United States Code, Title 18, Section 550.

“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.”

No. 10593

IN THE

United States Circuit Court of Appeals¹⁶

FOR THE NINTH CIRCUIT

FRANK KRAMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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PAUL P. O'BRIEN,
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APPELLANT'S REPLY BRIEF.

Statement.

In considering Appellee's Reply Brief, in so far as the jurisdictional statement is concerned, the statement is correct. On page 3 thereof under the heading "Summary of the Evidence" as follows: "As that summary neglects to depict some of the more important evidence disclosed at the time of trial and as appellant contends that the judgment of the court is not only contrary to the law but also to the evidence, it is perhaps advisable for the government to herein set forth a more accurate statement of the evidence produced in the District Court." As to this statement we respectfully refer to page 2 of our opening brief wherein we say: "The evidence is set forth in narrative form in bill of exceptions contained within the

transcript of the record beginning with page 22 and following through to page 67," to which we now wish to add that the evidence contained within the bill of exceptions beginning at page 22, Transcript of Record, and ending at page 107, is a full and complete statement of the evidence and its accuracy is particularly shown on page 107 of the transcript of the record wherein is stated: "I have read the foregoing Bill of Exceptions, approved it, and stipulate that it may be filed. Charles H. Carr, U. S. Attorney, by Walter S. Binns, Ass't. U. S. Attorney." Now if this stipulation means anything it means exactly what it says and that is that both the attorney for the appellant Frank Kramer and the District Attorney who settled and allowed the Bill of Exceptions knew and stipulated with the court that the same is full and complete, therefore in reply to the District Attorney's writing appellee's brief in this case we say that neither his interpretation nor the interpretation of the writer of this brief are necessarily to be followed by the Circuit Court of Appeals and, in so far as his interpretation is concerned, we say that it is far from correct and as he has made the same statement concerning our resume we therefore are of the opinion that the laborious task of settling this dispute is placed upon the Court which has to decide this appeal.

This brings us to the points of law. The point of law raised on page 7 of Appellant's Opening Brief was that the verdict is contrary to law and evidence as to all three counts. The distinction there sought to be made under Count I is entirely overlooked in the appellant's brief. The charge made in Count I against Frank Kramer was that he, Frank Kramer, together with others, did willfully, unlawfully, feloniously and fraudulently import and

bring into the United States certain narcotics in violation of Section 174 of 21 U. S. Codes Annotated. Section 173 of U. S. Codes Annotated says that it is unlawful to import or bring into the United States smoking opium. Section 174 of the same act provides the penalty therefor. Now we will consider, not only for the proposition of argument, but as an elementary proposition of law that under Section 550 of Title 18 U. S. Codes that the distinction between principals and accessories is distinctly abolished, therefore we consider the elementary proposition made by appellee that all persons concerned therewith are principals but we say without equivocation as was said by Judge Mahoney, in the case of *Palmero v. United States*, 112 Fed (2d) p. 922, that under the provision of Section 174 that a person can be charged with the act or likewise he can be charge, as was charged in that case, with aiding and assisting in the unlawful importation of opium, or as was more clearly stated by Judge Stephens of this Circuit in the case of *Pong Wing Quong v. United States*, 111 Fed. (2d) p. 751, that the importation takes place the minute the narcotic crosses the line, therefore we say that the importation of the drug was by the act of Katherine Wilson. Following this argument out logically, we now refer to Count II in our opening brief. If Katherine Wilson imported the drug and the drug was imported the minute it crossed the line, certainly Frank Kramer did not thereafter receive, conceal or buy after importation a drug knowing it to be imported, therefore the inconsistency of these two Counts appear on their face. The unadulterated facts from the Government's viewpoint, taking the evidence most favorable to the Government, attempt to show that in Mexico Frank Kramer caused

Katherine Wilson to conceal the narcotics on her person and while so concealed that the car was driven across the line, the narcotics being concealed on Katherine Wilson's person. We now say that the importation took place at the moment the narcotics crossed the line and further say that no other act took place thereafter. If these acts constituted an offense they so constituted an offense because of the criminal agreement between Katherine Wilson and Frank Kramer, therefore we say that in no way could Frank Kramer be guilty of all three Counts, including the conspiracy count and this is the proposition of law that we urgently urge.

Now, leaving this point for a minute, we also say that the evidence in itself does not show Frank Kramer to be guilty of any offense for reason of the fact that outside of the circumstances, which shows an act of importation by Katherine Wilson, that her word that he caused her to so import these narcotics is unworthy of belief and therefore that this Court, the Circuit Court of Appeals, should reverse and remand this case to the trial court, both as a matter of law and as a matter of fact.

Respectfully submitted,

JOHN S. COOPER,

Attorney for Frank Kramer, Appellant.



